DOCUMENT RESUME

ED 153 932 SO 010 876


AUTHOR Khanlian, John F., Ed.; And Others


TITLE Law and the Family: A High School Curriculum Guide.
INSTITUTION Institute for Political/Legal Education, Pitman, N.J.
SPONS AGENCY New Jersey State Dept. of Education, Trenton.
PUB DATE Dec 76
NOTE 138p.; Page 112 contains a copyrighted newspaper article and has been removed by ERIC. It is not included in the pagination
AVAILABLE FROM Institute for Political and Legal Education, 207 Delsea Drive (Route 47), RD Number 4, Box 209, Sewell, New Jersey 08080 $4.00, paper cover)

EDRS PRICE MF-$0.83 Plus Postage. HC Not Available from EDRS.
DESCRIPTORS Abortions; Adoption; Case Studies; Citizenship Responsibility; Civil Liberties; Court Doctrine; Court Litigation; Curriculum Guides; *Divorce; *Family (Sociological Unit); Inquiry Training; Instructional Materials; Interpersonal Relationship; *Learning Activities; *Legal Education; *Legal Responsibility; *Marriage; Relationship; Relevance (Education); Resource Materials; Secondary Education; Simulation; Social Change; Values



ABSTRACT

This curriculum guide is designed to assist high school classroom teachers in developing and implementing a program on family law. The major objective of the document is to help students understand how profoundly the law is associated with their private lives. The document is presented in four chapters. Key areas in this frequently ignored area of law-focused education are the "stages of the relationship" sequence--from preparation for marriage through divorce. Chapter I deals with establishing a marriage relationship. Case studies discuss homosexual marriage, marriage contracts, intention to marry, and getting married. Chapter II discusses rights and responsibilities of each family member. Chapter III investigates issues related to dissolving the marriage relationship such as divorce, child custody, support, alimony, property rights, and annulment. The final chapter reviews legal issues raised by adoption, abortion, and sterilization. Activities involve students in definition exercises, moot court participation, class discussion, analysis of case studies, interviews with domestic relations lawyers, determinization of legal principles central to specific case studies, true and false tests, and personal attitude surveys. An appendix presents a directory of family law resources, a guide to milestone legal cases, and a listing of Constitutional amendments with major relevance for family law. (Author/DE)



**********
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
**********

ED153932

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

BEST COPY AVAILABLE

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY
Institute for Political/ Legal Education
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

# LAW AND THE FAMILY

A High School Curriculum Guide

The materials presented herein were prepared pursuant to a Grant from the New Jersey State Department of Education under provisions of the Elementary and Secondary Education Act of 1965, Title III. However, the opinions expressed herein do not necessarily reflect the position or policy of the New Jersey State Department of Education or the United States Office of Education. The Institute for Political and Legal Education is a Nationally Validated Project of the U.S. Office of Education and is under the direction of Barry E. Lefkowitz.

Prepared and Edited by:
John F. Khanlian, IPLE Staff
Karen F. Knopp, IPLE Staff

Richard Green, Esquire, Consultant
Paul Kush, Jr., Graphic Arts Consultant

Institute for Political and Legal Education
December, 1976

SP010876

# INSTITUTE FOR POLITICAL AND LEGAL EDUCATION

## ADMINISTRATIVE STAFF

*Barry E. Lefkowitz, Director*
*Audrey S. Heinrichs, Ph.D., Program Coordinator*
*John F. Khanlian, Program Coordinator*
*Louise C. Stern, Program Coordinator*
*Katherine L. Wallin, Program Coordinator*

## EDUCATIONAL IMPROVEMENT CENTER - SOUTH - LEA

*Paul B. Winkler, Ed.D., Executive Director*

## PROJECT ADDRESS

INSTITUTE FOR POLITICAL AND LEGAL EDUCATION
207 Delsea Drive (Route 47)
RD #4, Box 209
Sewell, New Jersey 08080

Telephone: (609) 228-6000

# PREFACE

Law and the Family represents an attempt to provide the teacher and student with curriculum materials and ideas on a subject area where virtually nothing has been previously available in the field of law-focused education. It uses the "stages-of-the-relationship" sequence (from preparation for marriage through divorce) as an organizing theme of the text, with the concluding chapter being devoted to treatment of some particularly timely and controversial issues of family law--adoption, abortion, and sterilization.

A variety of teaching techniques and student activities--case study, simulations, outside speakers, independent research, panel debates, etc.--are suggested throughout the manual; background resource information, including some lengthy excerpts from landmark court decisions, is also contained herein. In addition, an attitudinal survey has been included which can be used at the beginning and/or conclusion of this curriculum as a values clarification exercise for the students on important issues of family law.

The major credit for the content of this manual must go to Karen Knopp (C'Konski) who did the major proportion of research and final writing of the book, along with our attorney consultant, Richard Green, who researched and prepared an initial outline and draft of the manual and developed many of the hypothetical case study exercises which are included. Paul Kush, our graphic arts consultant, worked closely with IPLE on developing the cover and illustrations. As always, Marge Russell, our secretary, deserves credit for her expert editing and typing of the final draft.

Law and the Family is in a real sense, an experimental working draft in the field-testing stage. We encourage teachers who use lessons from it to send us feedback on those activities which are successful and those which need to be strengthened. We also invite those who use this publication to submit lesson plans of their own based on material contained herein for publication in the final edition. We will pay ten dollars for any lesson plan we publish and, of course, credit the teacher who submitted it.

-- John F. Khanlian

# TABLE OF CONTENTS


INTRODUCTION & TEACHING STRATEGIES . . . . . vii

ATTITUDINAL SURVEY . . . . . ix

CHAPTER I

ESTABLISHING THE RELATIONSHIP

INTRODUCTION . . . . . 1

WHAT IS MARRIAGE TO ME & TO THE LAW? - A DEFINITION EXERCISE . . . . . 3

HOMOSEXUAL MARRIAGES - A PROBLEM OF DEFINITION . . . . . 4

*Baker v. Nelson* . . . . . 5

CONTRACT TO MARRY . . . . . 10

INTENTION TO GET MARRIED . . . . . 13

*Hypothetical Cases* . . . . . 14

GETTING MARRIED . . . . . 17

*Community Research Activity* . . . . . 18

*Case Study: Loving v. Virginia* . . . . . 19

*Values Clarification Exercise* . . . . . 23

CHAPTER II

ATTRIBUTES OF THE RELATIONSHIP

INTRODUCTION . . . . . 25

HUSBANDS & WIVES . . . . . 26

THE PRIVACY OF THE MARITAL RELATIONSHIP . . . . . 28

*Griswold v. Connecticut* . . . . . 29

THE PRIVACY OF THE FAMILY . . . . . 31

*The Case of Karen Quinlan* . . . . . 32

PARENT & CHILD - THE NATURE OF THE RELATIONSHIP . . . . 41

*Hypothetical Cases* . . . . . 44

*Custody & Support of Children* . . . . . 46

*Painter v. Bannister* . . . . . 49

## CHAPTER III

## DISSOLVING THE RELATIONSHIP


INTRODUCTION . . . . . .55

"WHEN I WANT A DIVORCE"
*by Shana Alexander* . . . . . .56

CUSTODY, SUPPORT, ALIMONY AND PROPERTY RIGHTS:
ROLE PLAY I . . . . . .65

DIVORCE: ROLE PLAY II . . . . . .70

ANNULMENT . . . . . .75
*Hypothetical Cases* . . . . . .76


## CHAPTER IV

## CURRENT ISSUES: ADOPTION, ABORTION, STERILIZATION


INTRODUCTION . . . . . .83

ADOPTION . . . . . .84
*Community Research Activity* . . . . . .85
*Moot Court: In re Watson* . . . . . .87

ABORTION . . . . . .94
*Case Study: Roe v. Wade* . . . . . .96
*Other Activities* . . . . . 108
*Background on 1976 Court Rulings* . . . . . 111

STERILIZATION . . . . . 113
*Buck v. Bell* . . . . . 114
*Skinner v. Oklahoma* . . . . . 117
*Hypothetical Case on Compulsory Sterilization* . . . . . 120

APPENDIX
*Resources Related to Family Law Issues* . . . . . 124
*Selected Bibliography* . . . . . 127
*How to Find Legal Cases* . . . . . 128
*Selected Relevant Amendments to the U.S. Constitution* . . . . . 129

# INTRODUCTION

Because law-related education is a component of citizenship education, any law-related curriculum should seek both to educate students to their rights and responsibilities under the law and to teach them how they might work to effect change in the law where, in the judgment of an informed citizenry, it is found inadequate.

Law and the Family addresses itself primarily to this first need. It attempts to ensure student understanding of just how profoundly the law is associated with the intimate relationships of their private lives. It is hoped, in addition, that study of American family law will produce students who can be informed consumers of the services of the legal community if and when they are required.

This overview of selective aspects of family law is in no way comprehensive either regarding the range of topics selected or the depth of treatment. No attempt is made legally to equip either the teacher or student to advise himself or others in the law. The purpose of this course of study is to sensitize the student to the issues which touch on the most profound human concerns which strike a common chord: matters of life, death, marriage, divorce, custody, adoption, and the controversial questions of abortion and sterilization. All of these matters involve the application of law at a most personal level, and there is continuous national debate about many of them. The fact that the modern American family is undergoing reexamination, hence change and the fact that it is the societal element that every student is intimately associated with make it essential that each student understand his own and society's relationship to and interest in the family unit.

Still this course is neither a sociology nor a psychology course. Though the topics presented will easily lend themselves to discussions which have sociological, psychological, even theological content, and though such discussions are encouraged so that the law is not considered in a vacuum, the purpose of this volume is to present the law as it is, not as practitioners of any particular discipline would like it to be.

## Teaching Strategies

1. Law and the Family explores such topics as marriage and divorce through case studies, the inquiry method as directed by specific questions for discussion, and accompanying explanation. At many points in this curriculum it is recommended that the teacher make use of outside resource persons, particularly attorneys. It might be helpful to contact one or more attorneys with experience in domestic relations law at the outset in the hope that they will work with students throughout the Family Law course. Some topics might call for expertise other than legal: doctors, psychologists,

marriage and family counselors, social workers, and theologians could make important contributions to a consideration of abortion, for example. Students who are taking sociology, psychology, or "family living" courses will have a different and likely helpful perspective with which to approach various issues and can perhaps share these in a "peer teaching" capacity.

2. Some suggestions about additional resource materials -- both books and organizations -- are made in the bibliographical lists included in the appendix. Many readings from literature - from Oedipus Rex to The Second Sex - have some relevance to this curriculum, and because the topics are of current interest, students may want to research magazines and newspapers for articles which bring them up to date on the matters considered in this volume.

3. Where it is always helpful for students to observe court procedure first-hand, teachers should make careful investigation to determine whether observers are permitted in their local domestic relations or divorce courts. If a field-trip is planned, students should understand that domestic relations proceedings are sometimes less restrained and more emotional than other types of court hearings.

## Attitudinal Survey - Values Clarification: Teacher Directions

On the next page there is an attitudinal survey the purpose of which is to help students clarify their own values about the family before they begin a study of Family Law. This should enable students to view the laws relating to families from their own perspective while attempting to understand alternative points of view. Thus a student who strongly agrees with Statement 11 may learn a great deal from a study of the Supreme Court's position on abortion and be compelled to justify his own values in the process.

Having students answer the attitudinal survey is only the beginning of the values clarification process. After students have responded to the statements the teacher should lead discussion centering around the following:

1. Why do students feel the way they do about the statements? Have they arrived at their positions through personal experiences, background and upbringing?

2. What are some alternatives to students' positions?

3. To what consequences do their positions naturally lead? For example, if a student agrees with Item 2, can he/she foresee homosexuals wishing to adopt children? What does the student think about that?

4. Which position - the student's or an alternative one - appears most desirable? Most practical? Why?

Thus the object of this values clarification exercise - and the attitudinal survey is just one method of values clarification[1] - is to enable students to see the difference, if any, between what is important to them and as they study Family Law, what is important to the law, in the hopes of learning to live with that difference.

1 For others, see Teaching About the Law, Gerlach and Lamprecht, W. H. Anderson Co., Cincinnati, 1975.

Attitudinal Survey

1. The stability of the nuclear family, composed of a married couple and their children, is essential if Western civilization is to be a healthy one.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

2. Homosexuals should be permitted to marry under the law.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

3. Children who spend eight hours a day, five days a week in day-care centers because both their parents work will probably suffer no ill effects from separation from their mothers.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

4. "The family is an anachronism. The future belongs to 'group marriages' or other alternatives in which each individual may lead a more personalized life style. 'Parenthood' will undoubtedly give way to 'personhood.'"

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

5. Custody of children whose parents are getting a divorce should be awarded the mother as a matter of course unless there is strong evidence that she is incompetent to care for them.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

6. Each family, and not the state, has the responsibility to care for its elderly members preferably at home and not in an institution.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

7. Couples with children who are unhappily married should remain together until their children attain the age of majority.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

8. American society is disintegrating today because of the breakdown of traditional family life.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

9. Children today never really experience childhood because they learn about sex, drugs, and the serious problems of society at a tender age through television, their own experiences, or those of their friends.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

10. The women's liberation movement has caused a healthy re-evaluation of the roles of both men and women who no longer need feel bound by traditional stereotypes.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

11. Because the state has an interest in preserving human life, it has the right to forbid abortions at any stage of pregnancy.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

12. "The family is in fact the only institution we have that doesn't have a hope of disappearing." Margaret Mead.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

13. No marriage is <u>really</u> complete unless the couple produces children.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

14. To better insure successful marriages, couples should be required to live together for 18 months <u>before</u> marriage.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

15. A family's right to privacy includes the right to discontinue treatment of a terminally ill member.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

16. Abortion is <u>not</u> the same as murder because doctors cannot agree that human life begins at conception.

| Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|---|---|---|---|---|

CHAPTER I

# ESTABLISHING THE RELATIONSHIP

## INTRODUCTION

Marriage is at the heart of any consideration of family law. The law has looked for centuries with special favor on the institution of marriage. One must understand this to understand any American laws regarding marriage. Our laws have their origin in English matrimonial law as it was administered by ecclesiastical courts (i.e., church courts). They are thus part of the common law but have been refined and altered by statute during our 200-year history. English matrimonial law in turn derives from canon law which consists largely of decrees promulgated by the Roman Catholic popes. Canon law was immediately preceeded by Roman law.

Stretching all the way back to the time of the Roman Republic, then, is a tradition of law which regards marriage and the family as essential to the strength of society, even to its existence. As the law has developed it has responded accordingly to this importance which significant Western societies have attached to marriage and family.

The law today reflects a public policy which understands marriage as the foundation of family and therefore of society. The law believes that marriage is essential to morality and civilization and that its civilizing influence is of vital interest to society and to the state.

Among the topics treated in this chapter is homosexual marriage. That the granting of marriage licenses to homosexuals is a problem which even won consideration by the Supreme Court of one of the states is an indication of how radically lifestyles, ideas, and attitudes are changing. Fifty years ago no lawyer would even have dared argue this case. Though the law is temporarily frozen, as it were, in conformity with social ideas which were the norm fifty years ago it will respond to change, as the miscegenation case later in this chapter will demonstrate. An examination of the issues should enable students to learn in which arenas they feel change is warranted and how much change they are willing to encourage.

Other topics covered in this chapter include the marriage contract, the intention of the parties to become married, ceremonial marriage, and the effect of a prior marriage on the current marriage. New concerns about women's rights are tending to cause slow change in

many of these areas, and we note these where appropriate. This manual, however, is intended to reflect the state of the law as it is, not as it may be several years hence. In this way, students who wish to work for legal change through the legislative process will learn what needs to be done.

Through the activity entitled What is Marriage to Me and to the Law? students will have an opportunity to communicate, to categorize, and to characterize their feelings and ideas on this subject. At the end of this process students should realize that the personal and state interest in this institution are inextricably bound -- the legal interest in marriage being a solemnization of society's perception of family needs.

Hypothetical cases are presented for student discussion and reaction. It is suggested that each case be given at the beginning of the lesson with the students being required to analyze and record the problem or problems presented and their solutions thereto.

At completion of this chapter, students will have been introduced to the various means of establishing the marriage relationship, their requisites and implications.

## WHAT IS MARRIAGE TO ME & TO THE LAW?

A Definition Exercise

Objective: To cause students to elicit the legal and non-legal attributes of marriage.

Lesson Plan:

1. Write lesson title on the chalkboard.

2. Ask students to list the attributes of marriage which are important to them, and allow time for discussion.

3. Write the following definition of marriage on the board or hand out copies of it to students:

   "Marriage....is the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community legally incumbent on those whose association is founded on the distinctions of sex."

   (Black's Law Dictionary, Revised Fourth Edition, 1968)

4. Lead a discussion in which there is comparison and contrast of the attributes of marriage which are important to students and those which are important to the law, as summarized in Black's definition. Do the students, for example, view marriage as a lifelong commitment? Do they see it as limited to "one man and one woman?" Remind students that some problems in reconciling their own definition of marriage with that of the law may be solved when they learn, for example, about the law's provisions for dissolving unsatisfactory marriages by means of divorce.

## HOMOSEXUAL MARRIAGES - A PROBLEM OF DEFINITION

### CASE STUDY

Homosexuals are becoming increasingly visible in American society. As has been the case with other minority groups, they are voicing a demand to be allowed to pursue their own style of living while being accorded the full rights and protection afforded others under the Constitution and our laws. The law has thus far refused to sanction their life-style as "normal" by permitting them, for example, to marry in a similar manner to heterosexual couples. The following case study affords a glimpse at the legal rationale for denying marriage licenses to homosexuals. Note that the definition of marriage is the crux of this case.

The Supreme Court refused to review Baker v. Nelson because it felt that the matter was one of power (to grant or refuse to grant marriage licenses) reserved to state governments and therefore that federal intervention was not required. This decision handed down by the Minnesota Supreme Court then represents the present status of the law on this subject.

The case below might be reproduced and given to students. Follow-up discussion should include questions to insure that students have understood the case and considerations of alternative points of view such as have been provided in the papal statement and the discussion of the Yale Law Journal article below.

BAKER V. NELSON, 291 Minn. 310, 191 N.W. 2nd 185 (1971)

1. Facts:

Richard Baker and Jim McConnell, adult men who both resided in Hennepin County, Minnesota, went to the District Court there to get a marriage license. A license is required for marriage under Minnesota state law. Nelson, the court clerk, refused to issue them a license because they were both men: there was no other reason for denying them a license. The two men sued Nelson to compel him to grant a marriage license to which they claimed they were constitutionally entitled.

At trial the judge not only ruled that Nelson did not have to issue such a marriage license, but specifically ordered him not to do so. Baker appealed to the Minnesota Supreme Court.

2. Issue:

Whether two persons of the same sex are permitted to marry under state law and, if not, whether the U.S. Constitution compels the state to permit such a marriage.

3. Arguments:

Attorneys for Baker and McConnell argued that because the state law did not define marriages in such a way as to specifically prohibit homosexual marriages, they were not against the law. Then they said that if the state did refuse to grant marriage licenses to homosexuals, it violated their constitutional right to equal protection and deprived them of liberty (to marry) and property (marriage provides tax benefits, for example, to the partners) without due process of law.

The lawyers for Nelson, the county clerk, said that even if the statute did not strictly define marriage in Minnesota as limited to a man and a woman, the framers of the law in territorial days could clearly have intended no other meaning because they could not have conceived of homosexual marriages.

4. Decision & Reasoning:

The court decided that it would be against Minnesota law to grant a marriage license to a homosexual couple.

They reasoned that the intent of those who drafted the law was to encourage "traditional" marriage: a union of members of two different sexes which forms the basis for a family.

Concerning the constitutionality of its decision, the Court quoted the decision it had rendered in Skinner v. Oklahoma[1]: "...the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." The Minnesota Court, then, thought that an application for a marriage license by a homosexual couple was different "in fact or opinion" from one by a heterosexual couple; therefore, homosexuals were not entitled to the same consideration under the law as heterosexuals with regard to marriage licenses.

Questions for Discussion:

1. Who were Baker and McConnell? What did they do?
2. Why did Nelson, the county clerk, refuse to issue them a marriage license?
3. What did the Court decide? Why?
4. Do you agree or disagree with the Court's decision? Why?

---

1 A case concerning compulsory sterilization of habitual criminals; 316 U.S. 535 (1942). The quote here is found on p. 540.

Homosexuality is a concern of many disciplines including psychology and sociology. Opinion on the subject ranges from the conservative, religious-based thinking of such groups as the Roman Catholic Church that homosexuality is a serious disorder to be cured, if possible, to the opinion of outspoken gay liberation groups that homosexuality and lesbianism are healthy alternative life-styles to be encouraged.

Since this curriculum manual is one on family law we have not attempted to treat the psychological or sociological implications of homosexuality. Even within the legal community, however, there are differing points of view on such controversial subjects. The paragraphs below have been summarized from the Yale Law Journal and represent the opinion that homosexuals do have a valid argument for obtaining marriage licenses and that the Supreme Court ought to address itself to that argument.

Summary: "The Legality of Homosexual Marriage," 82 Yale LJ 573 (1973).

In the case above, Baker v. Nelson, Baker and McConnell had argued that a refusal to grant them a marriage license was a deprivation of their Fourteenth Amendment rights to equal protection and due process of law and an abridgment of their fundamental right to marry. The Supreme Court of the State of Minnesota disagreed.

Section 1 of the Fourteenth Amendment says that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This is the language which generally compels the Supreme Court's review of cases where citizens complain of discriminatory treatment based on skin color. Because of the arduous history of black people in this country, including years of enslavement and then of monumental injustice, the Supreme Court has, at least during the past two decades, given special care and attention to cases where black persons have sought the protection of the 14th Amendment from racial discrimination.

An argument can be made that homosexuals are as politically disadvantaged because of their sexual preferences as blacks have traditionally been on account of their color. Certainly acknowledged homosexuals have risen to few positions of high responsibility in government or business and have had little effect on policy-making about homosexuality. Further, their status -- or lack of status -- in society is based on a characteristic which is, like skin color, largely beyond their ability to control. Finally, homosexuals have suffered a history of discrimination with little chance to affect the laws and practices which foster that discrimination. It may be that these three factors taken together should cause the Supreme Court to interest itself more deeply in the circumstances of America's homosexuals, as it did

with America's blacks. Marriage, which is considered a fundamental right by most of us, is perhaps an issue on which the Court should focus.

Even though procreation is not among the benefits of marriage available to married homosexuals, these are not requirements for other couples who wish to marry, and there are other advantages which would be quite helpful to them.[2] Married couples enjoy some tax advantages, can sue to recover for the wrongful death of their spouses, and are the recipients of a significant portion of their spouses' estates if the latter die without having made a will. In addition, marriage is likely to enhance the stability, respectability, and emotional depth of a homosexual relationship freeing the partners to lead fulfilled and useful lives.

But there is another interest to be counterbalanced against the gains homosexuals could anticipate deriving from obtaining marriage licenses; that is, the interest of the government in discouraging a life style it has long viewed as deviant. What interests does the government have, then? For one thing, it has felt -- reflecting the traditional views of its citizens -- that homosexuality needed treatment and rehabilitation rather than tolerance and legalization. The citizens, however, are no longer of one mind about homosexuality as indicated by the decision of American psychiatrists to remove it from their list of mental illnesses.

Even if homosexuality is not something which can be -- or need be -- "cured," there are few who would wish to encourage it among adolescents. Legislators have always feared that for the law to condone homosexuality would encourage young people to adopt it. The experience of other countries where homosexuality has been legalized outright, however, has been that legalization has had no effect on the number of adolescent homosexuals: no increase is observed.

Perhaps the Supreme Court has cause for hesitation when it realizes that, by declaring that homosexuals have a constitutional right to obtain marriage licenses, it would thus be sanctioning an activity which is in itself against the law in most states. However, statutes forbidding homosexuality in private between consenting adults are probably unconstitutional invasions of privacy anyway which would not hold up under Supreme Court scrutiny.

In the final analysis the most compelling argument against high court intervention on behalf of homosexual rights is doubtless society's feeling that homosexual marriages do not fall within the proper definition of marriage. But a convincing argument can be made that the 14th Amendment was intended to combat just such subjective and irrational distinctions as those based on skin color or sexual preference.

---

2 Some would, however, argue that homosexuals should be permitted to adopt and raise children.

"...The Court should not avoid granting full relief from discriminatory legislation simply because that legislation is based on deeply-held beliefs."[3]

Questions for Discussion

Homosexuality is a subject which often evokes much more than considered and rational discussion and opinion. Students may hold deeply entrenched beliefs which are religious or psychological in nature and which affect their thinking of how homosexuality should be treated under the law. The object of discussion following consideration of homosexual marriage is not to convince students that their thoughts are irrelevant to what the law is. It should be clear from the summary of the Yale Law Journal article that society's thoughts on homosexuality are responsible for the status of the law at present. But students should be helped to realize that the law struggles to be broad enough to accommodate all its constituents, not only Roman Catholics or gay liberationists.

1. Do you think the parallel drawn between blacks who suffer disadvantage because of skin color and homosexuals who suffer disadvantage on account of sexual preference is a valid one? Why? Is it worse to be unable to marry whom you choose because you're black than because you're gay?

2. Evaluate the gains to be won by homosexuals were they permitted to obtain marriage licenses.

3. Evaluate the interests of society in discouraging homosexuality through its government.

4. Which of the above two countervailing interests do you feel is more compelling? Why?

5. Do you think the proposed Equal Rights Amendment is necessary to help wipe out sex discrimination just as the 14th Amendment was to help alleviate race discrimination? (Under ERA, statutes like the Minnesota one would likely be unconstitutional.)

6. How do you feel about a "quasi-marital status" created by new legislation which would confer some marital benefits on homosexuals while denying them others?

7. Do you agree with the article summarized above that the Supreme Court ought not take deeply-held beliefs into account in interpreting the 14th Amendment? Suppose it could be proven that most (more than 50%) of the people in America are against the granting of marriage licenses to homosexuals. Should this have an effect on any ruling by the Supreme Court? What recourse do the people have if the Supreme Court rules in a way they find unacceptable?

---

3 82 Yale LJ 573 at 589 (1973).

## CONTRACT TO MARRY

Objective: To inform students that marriage involves a contract somewhat analogous to a business contract.

Marriage can be viewed from many different perspectives; for many people it inevitably contains a religious dimension. People sometimes return to be married to the church of their own or their partner's childhood even if neither is a practicing member of any faith when they marry. Different religions espouse varying canons on marriage and prescribe varying rites and ceremonies, but all who marry are under obligation to submit to the civil laws regulating marriage. In order to emphasize -- in accordance with the principle of separation of church and state -- that no one religious dogma is controlling in the eyes of the state with regard to marriage, the law has traditionally emphasized that marriage resembles a civil contract.

It is like a contract in that it creates rights and duties for each partner. But because marriage creates a status meant to be lifelong, because of the peculiar, tender nature of the agreement marriage is much different from an ordinary business contract. Normally, for example, the law is allowed to place no restraints on the capacity of any person to enter into a contract. But the state may legitimately impose requirements -- age is one -- on individuals which hinder their ability to marry. Two ten-year-olds could not enter a valid marriage, for example.

Most contracts are revocable at the will of both parties. If a person agrees in writing to sell a car to another for the sum of, say, $500, both could decide not to go through with the sale. They could tear up the contract and no law would have been broken. Even when both parties agree, however, that they no longer wish to be married, they cannot dissolve the marriage themselves but must submit to the judgment of the court.

Still the analogy of a marriage "contract" is a good one and useful to help students realize another dimension of the way in which the law regards marriage.

Lesson Plan:

1. Distribute case following.
2. Give students a few minutes to read and consider case.
3. Students write solutions for problems presented. Emphasize that they are to use common sense and their own reasoning powers. No prior knowledge of law is required.
4. Class discussion
5. Compilation of legal principles involved.

## CONTRACT TO MARRY

Student Case - Gifts, Engagement

Facts: John Jones and Mary Moore were engaged to be married. While engaged John gave Mary the following:

1. an engagement ring
2. a dinner ring
3. $50 to buy a wedding dress
4. other minor gifts

The engagement was broken, and John brought a lawsuit to recover the gifts.

Questions: What is the result of John's action in regard to each of the gifts?

Why must the legal result for each of the above items be different?

Student Case

1. John is entitled to recover the engagement ring. The engagement ring is a symbol of the proposed marriage and signifies that the one wearing the ring is engaged to the person who gave it. The law implies the condition that the marriage will be performed according to plan.

2. John is not entitled to get the dinner ring back. The dinner ring is merely a gift to which John intended to bestow ownership upon Mary at the time of the giving. Gifts are generally absolute unless the giver makes the gift conditional at the time of giving, as upon presentation of an engagement ring.

3. John is not entitled to the $50 if it was used for the purpose intended before the estrangement and subsequent demand for return of the gift. If, on the other hand, the money was not used, or was not used for the purpose intended, he would be entitled to its return.

4. John would or would not be able to recover the minor gifts depending on the nature of each gift and the conditions, if any, imposed at the time of the giving of these gifts.

This hypothetical case is based upon Albanese v. Indelicato, 25 NJ 144, 51 A.2nd 110 (1947).

Note: The purpose of the lesson above is not so much to have students remember the specific outcomes of the John Jones/ Mary Moore case, but rather to come to an understanding of the general concept that marriage involves a contractual relationship.

## INTENTION TO GET MARRIED

Objective: To establish the legal principle that

if parties to a marriage ceremony intend that the ceremony have some legal effect,

then a marriage results even though the parties did not desire all of the consequences which the law imposes on a marriage.

Lesson Plan:

1. Distribute student worksheet.
2. Students denote whether each of the statements is true or false.
3. Class discussion of student answers guided by the teacher so that the students reach an understanding of the principle above.

## INTENTION TO GET MARRIED

Student Worksheet

Write "true" in the blank preceding each statement if the statement is true. Write "false" if the statement is false. In the blank under each statement state why you have chosen your answer.

_____ 1. Even though Mary answered "no" to all of the minister's wedding ceremony questions asked during the wedding ceremony between John and Mary, they are held to be legally married once John puts the ring on Mary's finger.

_____ 2. John and Mary were playing the lead parts in the school play. For the sake of authenticity, the Reverend Mr. Smith was convinced to play the role of the minister. In the play John and Mary were married by the Reverend Mr. Smith. John and Mary were then considered legally married.

_____ 3. John and Mary participate in a marriage ceremony before Justice of the Peace Jones so that John and Mary can file their federal income tax returns jointly. They sign an agreement not to live together, not to contribute to each other's support, and not to be generally known in the community as husband and wife. The marriage is valid and binding.

_____ 4. Mary and Joe lived together for seven years, produced a son and a daughter, opened joint checking and savings accounts, and were generally known in the community as Mr. & Mrs. Joe Jones. Joe dies in an automobile accident. Mary even though having never been formally married, may inherit Joe's property as his widow.

_____ 5. Mike Morris validly married Jane Jones in Nevada five years ago and lived with Jane for three years. Last year he moved to New Jersey, met Betty Beautiful and was married to her by the Reverend Mr. Smith. Mike owns a cattle ranch in California which is a community property state. Mike dies in a plane crash. Betty now is the owner of the California cattle ranch because the California law provides that all property of the husband passes to the wife automatically upon the death of the husband.

TEACHER'S INFORMATION

Answers to Student Worksheet

1. False. Where there is not even an appearance of agreement by both parties there can be no marriage even though a ceremony takes place.

2. False. The existence or non-existence of marriage depends on the purpose with which the ceremony was performed.

3. True. If the parties to a ceremonial marriage desire the marriage to have some legal effect, the law imposes the assumption of full marital status.

4. True. Parties who have the capacity to contract and enter into an agreement presently operative may be considered to be married even though there has been no formal marriage ceremony. This type of marriage is know as a common law marriage. Only thirteen states (and the District of Columbia) recognize common law marriage. They are Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. In those states a couple must agree to live together publicly as husband and wife, hold themselves out to the community as such, and they must cohabit (have sexual intercourse) while living together. Other states will recognize the validity of a common law marriage if the couple is from a state where such marriages are legal.

5. False. Marriage is the union of one man to one woman. The second of two simultaneous marriages is bigamous and void. Subsequent marriages are valid only where a prior marriage has been dissolved by divorce, annulment, or the death of one of the parties.

## GETTING MARRIED

Mention was made in the Introduction to this chapter of the overriding importance which the state traditionally attaches to marriage. Among the "reserved powers" left to the states under the federal Constitution is the power to regulate marriage within Constitutional limits. Only when a state violates Constitutional mandates does the federal judiciary interfere with a state's control over its marriage laws. State legislatures are thus free to determine the requisite age, mental capacity and physical condition (e.g., blood tests are required before marriage in most states) of those who marry within its borders. It may impose restraints on the marriage of close relatives; it may insist that neither party be encumbered by an already-existing marital alliance. "The law fixes and regulates the marital relation on public considerations, according to the demands of propriety, morality, and social order..."[4] Each state recognizes every other's power to enact binding marriage laws. One who marries in Maine will thus be recognized as legally married in Arizona should he/she move there.

The first acitvity in this section allows students to discover just what regulations are imposed by their state and community on those who wish to obtain a marriage license and get married. The second is a case study which illustrates what happens when a state regulation concerning marriage runs afoul of the federal constitution.

---

4 52 Am Jur 2nd, Marriage § 10 Am Jur 2nd (American Jursiprudence, second edition) is a legal encyclopaedia to be found in any law library.

## GETTING MARRIED

A Community Research Activity

Objective: Students are to discern what steps are actually required to become married in the jurisdiction where the students reside.

Lesson Plan:

1. Students are assigned partners to marry in a role-playing simulation.

2. Students then are instructed to find out what steps are required as a prerequisite to marriage.

3. Students then walk through each step.

   By "walk through" we mean that students should go, for example, to the county or municipal official in charge of issuing marriage licenses and ask him to explain the process of obtaining one. They, of course, will not actually apply for a marriage license.

   Students should be careful to ascertain the age requirements for becoming married, at what age parental permission is no longer necessary, and what physical health and mental health requirements should be met. The officials whom the students contact would be able to explain these requirements in detail.

N.B. Teachers should be sure to check with each county official and other persons who will be contacted by students for clearance. Teachers must explain the purpose of the exercise to each of these persons.

## CASE STUDY: VIRGINIA'S ANTI-MISCEGENATION STATUTES

"ALMIGHTY GOD CREATED THE RACES WHITE, BLACK, YELLOW, MALAY, AND RED, AND HE PLACED THEM ON SEPARATE CONTINENTS. AND BUT FOR THE INTERFERENCE WITH HIS ARRANGEMENTS THERE WOULD BE NO CAUSE FOR SUCH MARRIAGES (BETWEEN BLACK AND WHITE PERSONS). THE FACT THAT HE SEPARATED THE RACES SHOWS THAT HE DID NOT INTEND FOR THE RACES TO MIX."[5]

Fewer than twenty years ago Virginia had on its books a series of laws known as anti-miscegenation statutes whose purpose it was to make it illegal for a black person to marry a white person. The statement above, rendered incredible and outrageous by the intervening years and their events, is merely a reflection of deeply-held beliefs in Virginia which crystallized into laws forbidding inter-marriage between races. The Lovings were married only four years after the landmark Brown v. Board of Education (1954) decision declaring "separate but equal" educational facilities unconstitutional.

Loving v. Virginia, decided by the Supreme Court in 1967, is a good example of how a state can exceed the constitutional limits of its power to regulate marriage. It is suggested that the teacher provide students with all information except the Supreme Court decision and let them reach a conclusion, only later to see whether they decided as the Court did.

---

5 Statement of County Circuit Court Judge, Carolina County, Virginia; quoted in Loving v. Virginia 388 U.S. 1 at 3 (1967).

LOVING V. VIRGINIA, 388 U.S. 1 (1967)

1. Facts:

In June 1958, two residents of Virginia, Mildred Jeter, a black woman, and Richard Loving, a white man, were married in the District of Columbia according to its laws. Shortly thereafter they returned to Virginia and took up residence in Carolina County. In October 1958, a grand jury indicted them for violating Virginia's anti-miscegenation statutes. They pleaded guilty at trial and were sentenced to one year in prison. The judge, however, promised to suspend the sentence for 25 years if they would leave Virginia and not come back for 25 years.

The Lovings did move back to Washington, D.C., and their attempts to have their convictions set aside because they violated the 14th Amendment were unsuccessful. Their final avenue of appeal was the U.S. Supreme Court, which agreed to decide their case.

2. Issue:

Whether a series of laws set up by the State of Virginia to prevent marriages between persons solely on the basis of their differing races violates the Equal Protection and Due Process clauses of the 14th Amendment.

3. Arguments:

The attorneys for the State of Virginia argued that the power to regulate marriage is a "police power" reserved to the states and that Virginia therefore had the authority to make any laws it wished to regulate marriage. They further contended that the anti-miscegenation statutes did not discriminate on the basis of race because they punished equally members of both races who attempted the prohibited marriage: the law was equally applied. Then they said that since there was no agreement of scientific evidence about whether it was sound to distinguish in law between interracial and other types of marriages, the Court ought to bow to the judgment of the State legislature.

Attorneys for the Lovings countered that the equal application of punishment for violation of the laws did not obscure the fact that they were founded on racial distinctions and hence violated the 14th Amendment because it forbids differentiation solely on the basis of race. In addition they said that to deny automatically and by statute the right of the Lovings to marry, the State robbed them of a "fundamental right" without due process of law.

Questions for Discussion

1. Who were the Lovings? What did they do?

2. What was the result of their actions?

3. What interest did the Lovings have in being legally married in Virginia?

4. What interest did the State have in keeping them from residing in Virginia as a married couple?

5. How would you decide this case? Why?

Reasoning and Decision:

The Supreme Court held that Virginia's anti-miscegenation statutes violated (1) the Equal Protection and (2) the Due Process clauses of the 14th Amendment, and it reversed the convictions of the Lovings.

(1) "There can be no question but that Virginia's anti-miscegenation statutes rest solely upon its distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races....this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"

(2) "Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."

Questions for Discussion

1. Do you agree or disagree with the Court's decision? Why?

2. What do you think about the statement of the County Court judge quoted at the beginning of this case study?

3. Compare this case with Baker v. Nelson, earlier in the chapter. One lawyer has voiced the opinion that one could not win a case in the Supreme Court where his argument was based on racial distinctions. The Court now refuses to accept any distinctions drawn on racial classifications as legitimate, yet it apparently feels that states are within the proper limits of their powers when they draw distinctions on the basis of sexual preference. Do you think this is equitable or not? Why?

## VALUES CLARIFICATION EXERCISE - ROLE PLAY

Divide the class into equal numbers of "parents" and "children". The "children" are to be college students (seniors) living some distance from home. Each has decided to marry, upon graduation, a person of a race different from his own. Pair each "child" with a "parent".

The first assignment is for each "child" to write a letter home explaining his decision and the reasons for it to his "parent". Each "parent" then responds with a letter of his own responding as honestly as he/she can in his/her "parent" role.

Then allow class time to simulate an encounter between "parents" and "children" at Christmas vacation, where they discuss the situation. This can be done in pairs or in larger groups. After the role-play discussion is finished allow time for de-briefing. What problems/fears, if any, did the "children" have in explaining the situation to their "parents"? What problems/fears did the students have in accepting the decision? Was either group afraid of the consequences of such a decision? Of what consequences? Is there any connection between these fears and the attitude of the Supreme Court of Virginia in refusing to allow interracial marriages?

## CHAPTER II

# ATTRIBUTES OF THE RELATIONSHIP

### INTRODUCTION

The activities to be undertaken seek to help the student to perceive the problems, rights and responsibilities involved in the familial relationship, as well as to appreciate the legal response thereto. When the student has completed the activities that follow, he/she should be able to describe the general rights and responsibilities of each family member.

It should be understood that the factual context in which much of the law is enunciated is necessarily one in which the relationship has broken down or ceased to function. One must realize that much of the effect of the law in this area is remedial: the general perception and philosophy of the law is non-interference in inter-family relationships, unless and until some break-down is manifested.

## HUSBANDS AND WIVES

The old, unwritten common law[1] which America inherited from England regarded a husband and a wife as one person, namely the husband. A wife had little identity of her own under the law.

What does this mean? What are the hallmarks of legal identity? How do we know when a person is fully recognized by the law? Beyond the right to vote, control and management of one's own property -- both real estate and personal property -- is a sign of someone's legal "personhood." The ability to make contracts independently of anyone else is another; the ability to sue and be sued a third. Maintenance of one's own home is still another.

Prior to about 1830, an American woman had none of these rights: she surrendered them all to her husband who, as head of the family, controlled all his wife's property (including anything she had owned before marriage) and chose the marital "domicile,"[2] that is, decided where they would live. The wife was legally obliged to abide by his decisions in these respects, and the law forbade her to make contracts of her own or to enter into a lawsuit.

In return for her second-class citizenship, a wife was entitled to complete financial support by her husband and to inherit a certain percentage of his property (usually one-third) when he died.

Around 1830, the several states began to pass what are called Married Women's Property Acts which gave women some of the rights formerly reserved to men. By virtue of these laws women were (and are) able to "contract, sue and be sued, and acquire, hold, and convey property in their own right, free from interference by their husbands."[3]

Despite these early steps toward equality for husbands and wives and more recent advocacy of even stronger measures by women's rights groups, the law still regards the husband as "head of the family," with the primary duty to support it. Legal inequities work to the detriment of men rather than women where support is concerned. While most states have laws compelling a husband to support his wife and family, few have similar provisions applicable to women. A woman, however, cannot sue her husband to provide her adequate support money for her personal needs while they are living together: her only recourse is a suit to obtain a separation or divorce.

---

1 See discussion of varying types of law under "Parent and Child," this chapter.

2 "That place where a man has his true, fixed, and permanent home...to which whenever he is absent he has the intention of returning." Black's Law Dictionary, Rev. 4th Ed., 1968.

3 Robert T. Kimbrough, Summary of American Law, Lawyers Cooperative Publishing Co., Rochester, N.Y., 1974, § 9:17.

The choice of legal domicile still rests with the husband provided his choice is reasonable. It is, for example, reasonable for a man who lives in Maryland to take a new job in Oregon and expect his wife to accompany him. Of course, under normal circumstances husband and wife would discuss such a move thoroughly and would reach an agreement about its desirability. Technically, however, it is the husband who has the right to make this decision.

Because laws governing husbands and wives differ from state to state, general discussion of them has only limited value. Perhaps a better method is to invite to the classroom a lawyer who has done domestic relations litigation to conduct a lesson on the legal rights and responsibilities of married persons. The following lesson plan may be useful as a guide for the lawyer.

Objective: To inform students of the legal rights and responsibilities of married persons in their state.

Lesson Plan:

A lawyer with experience in domestic relations law[4] is invited to discuss the law regarding marriage with special attention to the following questions:

1. What is a "legal domicile" and how does the concept apply to married persons? Is a wife permitted to retain a domicile separate from that of her husband?

2. Is there any law regarding a woman's changing her surname to her husband's after marriage?

3. Who is primarily responsible for support of the family? What does this responsibility entail?

4. Are spouses permitted to sue each other for personal injuries? Are they permitted to sue each other for "loss of consortium?"[5]

5. What is the law regarding testimony in a criminal trial by a wife/husband against her/his spouse?

6. What is the "community-property" system?[6] Is yours a community-property state? If so, how does this system function? If not, what is the law regarding the property of husbands and wives?

---

4 Your local Bar Association should be able to help you locate one, or perhaps a male-female team of lawyers could be invited.

5 "Consortium has been defined to include, in addition to material services, elements of companionship, felicity, and sexual intercourse, and the service, companionship, and comfort associated with the marriage relationship, to all of which both spouses have a right." Kimbrough, § 9:16.

6 Under the community-property system -- in effect in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington -- property (except gifts and inheritances) acquired by either spouse during marriage belongs to husband and wife equally.

## THE PRIVACY OF THE MARITAL RELATIONSHIP

The right of Americans to privacy, to be let alone, under their Constitution is one which was not asserted until late in the last century. The concept has been developing ever since, and has been held applicable to the marital relationship by the Supreme Court in cases like Griswold v. Connecticut, below.

"The Griswold decision's primary importance is the designation of privacy as a constitutionally protected right in circumstances where the state regulation is in an area which touches important human liberties. The notion of the interplay between fundamental personal rights and invasion of privacy has had major significance in the development of constitutional law. As the abortion decisions illustrate (see Chapter IV), however, what constitutes or should constitute an invasion of privacy for constitutional purposes has not been well-defined."[7]

It is clear, however, that an attempt by a state to regulate or prohibit the practice of contraception by a married couple does constitute an unconstitutional invasion of their right to privacy.

---

7 Richard P. Longaker & Charles N. Quigley, High School Law Program Attorney's Source Book, Law and American Youth Committee, Young Lawyers' Section, American Bar Association, 1973, pp. ix-18.

GRISWOLD V. CONNECTICUT, 381 U.S. 479 (1965)

Dr. Griswold was Executive Director of the Planned Parenthood League of Connecticut. In this capacity he gave instruction, information, and medical advice to married persons about contraception which included a medical examination of the wife and a prescription for the type of contraception best suited to her use. A fee was normally charged for these services, although they were occasionally performed free.

Connecticut law forbade the use of contraceptive drugs or devices and also prohibited a person from counseling or advising another to use contraception. Griswold was found guilty of violating this Connecticut statute and fined $100.

The countervailing interests in this case are thus: Connecticut's interest in exercising its 10th Amendment police power to regulate contraception as against the interests of married persons to plan their families with physicians' help.

Speaking through Mr. Justice Douglas the Court decided that the Connecticut law violated Dr. Griswold's and the married couple's right to privacy. It held that a right to privacy of association is implied under the Constitution by the First Amendment's guarantee of freedom of association. Similarly, the Third Amendment's prohibition against quartering of soldiers in private homes in peace time, the Fourth Amendment's guarantee against "unreasonable searches and seizures," and the self-incrimination clause of the Fifth Amendment create zones of privacy protected from intrusion by the government. Finally, the Ninth Amendment says that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Finding, then, that several Constitutional guarantees imply a right to privacy, the Court said that Connecticut had overstepped the bounds of its police power: "...governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

Questions for Discussion:

1. What law had Dr. Griswold violated?

2. Why do you think he wished to be allowed to offer counseling about contraception?

3. What interest did Connecticut have in prohibiting such counseling?

4. Do you agree with the Court's decision? Why?

5. It was the case in Griswold that a doctor was providing counseling on contraception to married persons. On what basis of Griswold do you think the Court could rule that prohibiting use of or counseling about contraception for unmarried[8] persons was unconstitutional? How about laws forbidding sexual intercourse between unmarried persons? (Most states have such laws at present.) Remember that the interests weighed are always the importance of the state's desire to regulate some activity versus the individual's right to act without interference from his government.

6. Refer back to Baker v. Nelson in Chapter I. What did the Court decide there? Keeping in mind what was said above about states' interests v. individual rights, why did the Minnesota court refuse to uphold a right of privacy for homosexuals who wish to marry? How do you feel about its decision?

Cartoon was removed by ERIC due to copyright law.

© 1976 by The New York Times Company.
Reprinted by permission

8 In Eisenstadt v. Baird, 405 U.S. 439 (1972), the Court held that it is a denial of equal protection to the unmarried to forbid distribution of contraception to them.

In the introduction to the Griswold case, above, it was noted that the courts have not yet determined a clear boundary between a citizen's constitutionally protected right to privacy and the government's constitutional right to act in the best interests of its citizens. When courts are weighing countervailing interests of citizens and the government, they use the "compelling interest" test. That is, they ask whether the state had a compelling enough interest in acting as it did to warrant intrusion on a citizen's privacy. In Griswold, the Supreme Court thought that Connecticut's interest in prohibiting contraception (the legislation was an exercise of its "police power" under the 10th Amendment) was not compelling and did not justify its violation of marital privacy.

The issues, however, stretch beyond Griswold and a decision by a married couple to have children or not. The case below arose in New Jersey when a comatose young girl was brought to a hospital where she was connected to a machine to enable her to breathe (a respirator). When it seemed to her parents that her chances for surviving to lead a normal life were lost, they asked the New Jersey Superior Court to grant them permission to disconnect her from the respirator keeping her alive.

There are several different, rather complicated legal issues raised by this case, but the basic question being asked is whether a family has the legal right to determine the fate -- life or death -- of one of its members who is incompetent to decide his own fate.

Because the Quinlan case involves previously un-litigated issues which are likely to recur in the courts as technology advances, it is treated here in some depth. It is presented in the following fashion and in such a way as to focus on the privacy issue. Teachers or students who are particularly interested in this case would do well to read the Superior Court opinion written by Judge Muir and the N.J. Supreme Court opinion written by Chief Judge Hughes. Both are well-reasoned and well written, but rather detailed and complex, laced as they are with medical and legal terminology.

| | | |
|---|---|---|
| Section | I | The factual base of the case |
| | II | The arguments presented at trial court (i.e., N.J. Superior Court) |
| | III | The conclusions reached by Judge Muir who presided in Superior Court |
| | IV | The appeal |
| | V | The conclusions reached by the New Jersey Supreme Court |
| | VI | Post Script |

## THE CASE OF KAREN QUINLAN

### I - Factual Base

On April 15, 1975, Karen Quinlan was admitted to Newton Memorial Hospital. No one was able to say precisely what the events were leading up to her admission: she had apparently spent the evening with friends, had had some alcholic beverages to drink, and lost consciousness. There were other drugs in her system too, but these were considered to be "in the therapeutic range" (i.e., they could have been taken legitimately to relieve some ailment) by Dr. Morse, her attending physician. She is reported to have stopped breathing for at least two fifteen-minute periods before her arrival at Newton Memorial.

Karen was placed on a respirator. The following day she was found to be in a state of coma, unable to breathe independently of the respirator.

Upon learning of her admission to the hospital, Karen's parents urged the doctors to do all they could to save her life. While she was at Newton Memorial, however, and after her transfer to the Intensive Care Unit of St. Clare's Hospital, her doctors were unable to ascertain the exact cause of her condition nor could she ever breathe on her own for longer than a half-hour when removed from the respirator.

Though she is not "brain dead" by the prevailing medical standard, Karen Quinlan's doctor testified that she will not "return to a level of cognitive function" and remains an incompetent in what is termed "a persistent vegetative state."

After several months during which Karen's condition did not improve, her parents consulted with their Roman Catholic priest who advised them that the Catholic church did not oblige its members to sustain life by extraordinary measures. The Quinlans then signed a release authorizing Karen's physician to "discontinue all extraordinary measures, including the use of a respirator" to keep her alive. Her doctor, however, refused to do this saying that to do so would be a substantial deviation from medical tradition. At this point, the Quinlan's sought help from the Court, asking it to appoint Joseph Quinlan Karen's legal guardian so that he could authorize her removal from the respirator.

The case was first heard by the Superior Court of New Jersey[9] of Morris County, then appealed by the Quinlans to the Supreme Court of New Jersey[10] where it was decided on March 31, 1976.

---

9 137 N.J. Super. 227 (1975).

10 A-116, September Term, 1975.

## II - N.J. Superior Court

Before the Superior Court's Judge Muir, attorneys for the Quinlans made the following arguments:

1. That Joseph Quinlan should be appointed his daughter's legal guardian,[11]

2. The Court should exercise its equity powers[12] to act in Karen Quinlan's best interest by authorizing her withdrawal from the respirator,

3. Under the following constitutional principles, the Quinlans should be permitted to authorize the termination of her treatment·

   a. By virtue of the constitutional right of privacy, the Quinlans have the right to decide to terminate "futile use of extraordinary measures."

   b. By virtue of the right to free exercise of their religious beliefs, the Quinlans should be permitted to terminate Karen's treatment. As Roman Catholics they are not obligated to use extraordinary measures to keep her alive, and the use of such measures prevents her from attaining happiness after death.

   c. By virtue of the right to freedom from cruel and unusual punishment, Karen's parents should be permitted to relieve her from life supported only by machines.

---

11 Since Karen Quinlan had passed the age of majority at the time of her admission to the hospital, her parents were no longer her guardians as a matter of course. The law provides that a legal guardian be appointed by a court when a person is incompetent, i.e., unable to manage his own affairs.

12 "Equity is a system of jurisprudence developed by the English Chancery to mitigate the rigidity and limitations of the common law and to provide remedies where none existed at law or where the legal remedy was inadequate...
"The American states inherited the English system of equity jurisprudence along with English common law." Robert T. Kimbrough, Summary of American Law, Lawyers Cooperative Publishing Co., Rochester, N.Y., 1974, pp. 264-5.
Thus our American courts are free to apply equity principles if, as here, there is no statute or body of case law dealing with a situation.

Lawyers on the opposing sides[13] argued that Karen Quinlan is not dead by the ordinary medical standards[14] for determining "brain death," and not legally dead under the laws of New Jersey, that for the court to authorize termination of respirator treatment would constitute homicide and euthanasia.

The attorneys for the doctors, in particular, suggest that a decision to end Karen's life ought to be made by doctors and not by a court of law, and that the court would have to set standards about the quality of life (when is life worth preservin ? when is it not?) to render such a decision.

## III - Judge Muir's Conclusion

Judge Robert J. Muir, who rendered the opinion for the Superior Court of New Jersey, framed the issue this way: "...does this Court have the power and right under the mantle of either its equity jurisdiction, the constitutional rights of free exercise of religion, right of privacy, or privilege against cruel and unusual punishment, to authorize the withdrawing of the life-sustaining techniques?"

His determinations on these issues were as follows:

Cruel and Unusual Punishment: "The proscription (of the Eighth Amendment against cruel and unusual punishment) is directed to state imposed criminal sanctions, not the situation presented here.... Continuation of medical treatment, in whatever form, where its goal is the sustenance of life is not something degrading, arbitrarily inflicted, unacceptable to contemporary society or unnecessary. The Eighth Amendment has no applicability in this civil action."

Right of Privacy: "...The power of the parents to exercise the constitutional right is found lacking on several grounds: First, the only cases where a parent has standing to pursue a constitutional right on behalf of an infant are those involving continuing life styles...Second, the parents urged Dr. Morse to do everything at the outset to save Karen's life. The parents now ask him to abandon his conscience and allow her life to end. In Roe v. Wade,[15] the court refused to hold that the right of privacy included the unlimited right to body control. In a like manner, the right to privacy, being urged through a parent, must be fettered, when in conflict with a doctor's duty to provide life-giving care. There is no constitutional right to die that can be asserted by a parent for his incompetent adult child."

---

13 These included attorneys for Karen Quinlan herself, for the State of New Jersey, for Morris County, for Karen's doctors, and for St. Clare's Hospital, all of whom were defendants arguing that Karen's life should not be terminated.

14 E.g., The Report of the Ad Hoc Committee of the Harvard Medical School, 205 J.A.M.A. 337 (1968).

15 The famous Supreme Court case where the Court ruled on whether a woman has the right to obtain an abortion. It is treated later in this manual.

Free Exercise of Religion: "There is no governmental or other interference with religious belief here that is caused by the Court's refusal to authorize the termination of the respirator."

Under Equity Jurisdiction: "The breadth of the power to act and protect Karen's interests is, I conclude, controlled by a judicial conscience and morality that dictate the determination whether or not Karen Ann Quinlan be removed from the respirator is to be left to the treating physician. It is a medical decision, not a judicial one. I am satisfied that it may be concurred in by the parents but not governed by them. This is so because there is always the dilemma of whether it is the conscious beings relief or the unconscious beings welfare that governs the parental motivation."

"It is also noted the concept of the Court's power over a person suffering under a disability is to protect and aid the best interests. As pointed out, the Hart and Strunk[16] cases deal with protection as it relates to the future life of the infants or incompetents the authorization sought, if granted, would result in Karen's death. The natural processes of her body are not shown to be sufficiently strong to sustain her by themselves. The authorization, therefore, would be to permit Karen Quinlan to die. This is not protection. It is not something in her best interests, in a temporal sense, and it is in a temporal sense that I must operate whether I believe in life after death or not. The single most important temporal quality Karen Ann Quinlan has is life. This Court will not authorize that life to be taken from her."

"...Equity follows the law. When positive statutory law exists, an Equity Court cannot supersede or abrogate it. The Common Law concept of homicide, the unlawful killing of one person by another, is reflected in our codified law...The intentional taking of another's life, regardless of motive is sufficient grounds for conviction... Humanitarian motives cannot justify the taking of a human life...The fact that the victim is on the threshold of death or in terminal condition is no defense to a homicide charge...It is a reasonable conclusion that the law of this State would preclude the removal of Karen Quinlan from the respirator. As such, a Court of Equity must follow the positive statutory law; it cannot supersede it."

Finally, Judge Muir said that Mr. Quinlan's "anguish would be continued and magnified by the inner conflicts he would have if he were required to concur in the day by day decisions in the future care and treatment of his daughter. These conflicts would have to offset his decision making processes." He therefore ruled that Mr. Quinlan would manage his daughter's property and business affairs, but not her "physical being" and appointed an attorney to act in the latter capacity.

---

16 The citations for these cases are: Strunk v. Strunk, 445 S.W. 2nd 145 (Ky. Ct. App. 1969); Hart v. Brown, 29 Conn. Sup. 368, 289 A.2nd 386 (1972).

## IV - The Appeal

Since Judge Muir's decision was that he could not authorize Karen's withdrawal from the respirator as her parents had sought, they appealed it to the New Jersey Supreme Court.

## V - The New Jersey Supreme Court Decision

"...The Court confronts and responds to three basic issues:

1. Was the trial court correct in denying the specific relief requested by plaintiff, i.e., authorization for termination of the life-supporting apparatus, on the case presented to him? Our determination on that question is in the affirmative.

2. Was the court correct in withholding letters of guardianship from the plaintiff and appointing in his stead a stranger? On that issue our determination is in the negative.

3. Should this Court, in the light of the foregoing conclusions, grant declaratory relief[17] to the plaintiff? On that question our Court's determination is in the affirmative.

This bring us to a consideration of the constitutional and legal issues underlying the foregoing determinations."

Cruel and Unusual Punishment: "...Inapplicable to the case before us is the Constitution's Eighth Amendment protection against cruel and unusual punishment which, as held by the trial court, is not relevant to situations other than the imposition of penal sanctions.

Free Exercise of Religion: "We think that, ranged against the State's interest in the preservation of life, the impingement of religious belief, much less religious 'neutrality'[18] as here, does not reflect a constitutional question, in the circumstances at least of the case presently before the Court. Moreover, like the trial court, we do not recognize an independent parental right of religious freedom to support the relief requested.

---

17 Declaratory Relief or Judgment: One which simply declares the rights of the parties or expresses the opinion of the Court on a question of law without ordering anything to be done.

18 The Court uses the phrase "religious neutrality" here because the position of the Catholic Church (the Quinlans are Catholics) as summarized earlier in its opinion is that "The verification of the fact of death in a particular case cannot be deduced from any religious or moral principle and, under this aspect does not fall within the competence of the Church..." Thus the Church leaves this sort of determination to "traditional and medical standards" and maintains neutrality.

Right of Privacy: "...The Court in Griswold[19] found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights 'formed by emanations from those guarantees that help give them life and substance.' Presumably this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions, Roe v. Wade[20]..."

"The claimed interests of the State in this case are essentially the preservation and sanctity of human life and defense of the right of the physician to administer medical treatment according to his best judgment. In this case the doctors say that removing Karen from the respirator will conflict with their professional judgment. The plaintiff answers that Karen's present treatment serves only a maintenance function; that the respirator cannot cure or improve her condition but at best can only prolong her inevitable slow deterioration and death; and that the interests of the patient, as seen by her surrogate, the guardian, must be evaluated by the court as predominant, even in the face of an opinion contra by the present attending physicians. Plaintiff's distinction is significant. The nature of Karen's care and the realistic chances of her recovery are quite unlike those of the patients discussed in many of the cases where treatments were ordered. In many of those cases the medical procedure required (usually a transfusion) constituted a minimal body invasion and the chances of recovery and return to functioning life were very good. We think that the State's interest contra weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest. It is for that reason that we believe Karen's choice, if she were competent to make it, would be vindicated by the law. Her prognosis is extremely poor,--she will never resume cognitive life. And the bodily invasion is very great,--she requires 24-hour intensive nursing care, antibiotics, the assistance of a respirator, a catheter and feeding tube.

Our affirmation of Karen's independent right of choice, however, would ordinarily be based upon her competency to assert it. The sad truth, however, is that she is grossly incompetent and we cannot discern her supposed choice based on the testimony of her previous conversations with friends, where such testimony is without sufficient probative weight. 137 N.J. Super. at 260. Nevertheless we have concluded that Karen's right of privacy may be asserted on her behalf by her guardian under the peculiar circumstances here present."

---

19 Griswold v. Connecticut, 381 U.S. 479 (1965) decided by the United States Supreme Court.

20 Roe v. Wade, 410 U.S. 113 (1973).

The Court went on to consider its obligations in light of accepted medical standards[21] for determining life and death criteria: "The question is whether there is such internal consistency and rationality in the application of such standards as should warrant their constituting an ineluctable bar to the effectuation of substantive relief for plaintiff at the hands of the court. We have concluded not...we conclude that the state of the pertinent medical standards and practices which guided the attending physicians in this matter is not such as would justify this Court in deeming itself bound or controlled thereby in responding to the case for declaratory relief established by the parties in the record before us."

Thus, having declared itself not bound by medical standards upon which physicians themselves are not necessarily in agreement, the Court went on to dispose of the question of criminal liability for homicide by anyone who participated in the decision to remove Karen from the respirator. "We conclude that there would be no criminal homicide in the circumstances of this case. We believe, first, that the ensuing death would not be homicide but rather expiration from existing natural causes. Secondly, even if it were to be regarded as homicide, it would not be unlawful."

The Supreme Court of New Jersey made the following decisions:

1. It appointed Joseph Quinlan guardian of both Karen's property and her physical person:

"The trial court was apparently convinced of the high character of Joseph Quinlan and his general suitability as guardian under other circumstances, describing him as 'very sincere, moral, ethical and religious.' The court felt, however, that the obligation to concur in the medical care and treatment of his daughter would be a source of anguish to him and would distort his 'decision-making processes.' We disagree, for we sense from the whole record before us that while Mr. Quinlan feels a natural grief, and understandably sorrows because of the tragedy which has befallen his daughter, his strength of purpose and character far outweighs these sentiments and qualifies him eminently for guardianship of the person as well as the property of his daughter. Hence we discern no valid reason to overrule the statutory intendment of preference to the next of kin.

2. It held that:

"Upon the concurrence of the guardian and family of Karen, should the responsible attending physicians conclude that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state and that the life-support apparatus now being administered to Karen should be discontinued, they shall consult with the hospital "Ethics Committe" or like body of the institution in which Karen is then hospitalized. If that consultative

---

21 Here, those enunciated by the Ad Hoc Committee of the Harvard Medical School, 205 J.A.M.A. 337 (1968).

body agrees that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn and said action shall be without any civil or criminal liability therefor on the part of any participant, whether guardian, physician, hospital or others."

## VI - Postscript

At this writing Karen Quinlan has been removed from the respirator and continues to breathe while receiving nourishment and antibiotics intravenously. She is presently being cared for in a nursing home in Morris County, New Jersey.

## ACTIVITY

"The right to a natural death is one outstanding area in which the disciplines of theology, medicine, and law overlap..."[22]

Organize a PANEL DISCUSSION including on the panel a doctor, lawyer, and a clergyman. Provide each of your speakers with a copy of the decision of the New Jersey Supreme Court In the Matter of Karen Quinlan, and ask each to take a position on the opinion according to the standards of his/her profession.

A student might moderate the discussion allowing each speaker time to present arguments, opinions, and comments on the case. A question-and-answer period in which all students (other classes might be invited) can participate should be held.

During a subsequent class period, the panel discussion should be "de-briefed" and evaluated by class members according to

1. the quality of the content of the discussion and Q & A, and
2. how well the discussion was orchestrated, or how smoothly it ran.

---

22 Opinion of the Supreme Court of N.J., In the Matter of Karen Quinlan, A-116 Sept. Term 1975, p. 24.

## PARENT AND CHILD

### The Nature of the Relationship

Objectives:

1. Students will realize that under the law, society allocates responsibility for children to individuals depending on the factual circumstance of the child's birth.

2. Through this experience students will become familiar with part of the process of "legal reasoning," i.e., the application of existing principles of law to a given fact situation.

Lesson Plan:

The principles of law which follow should be distributed to students, and the teacher may need to spend some time answering questions to ensure that they understand what the principles mean. These principles will be applied to hypothetical situations.

The hypothetical cases on the following pages should be reproduced and distributed to the students. Students are to be instructed to use the applicable legal principles to solve the problems presented.

Teacher Background:

Because students are to be introduced via this exercise to legal reasoning, per se, it might be helpful to provide some further background information to the teacher at this point. The tasks here required of students are ones performed daily by law students and practicing attorneys who must (1) learn standing rules of law; (2) analyze whatever set of facts is presented by a client or an hypothetical case; and (3) decide which rule(s) of law is(are) applicable to the given situation.

There are three components comprising American law: common law, statutory law, and case law. The common law is "that body of law and juristic theory which was originated, developed, and formulated and is administered in England, and has obtained among most of the states and peoples of Anglo-Saxon stock." (Black's Law Dictionary, Rev. 4th Ed., 1968.)

The common law consists of principles and rules of action which derive their authority from long-held customs and usages and from the decrees of courts recognizing and upholding such customs. In America, common law refers to the body of English rules in force here before the Revolution. Though the founding fathers drafted a Constitution and though we have been steadily enacting laws through out legislatures ever since, the rules of common law have been held sound and have been honored by American courts throughout our history.

The second component of American law, our statutes, are all the laws passed by state legislatures and the Congress.

It is the third component, however, which directly concerns the student in this exercise, the case law. When a court is ruling on a suit brought before it, it considers not only whether common law applies and what statutes obtain but also how other, similar cases have been decided. If another case dealing with the same legal question has come before the court in the past, or if one has come before a higher court, our court will rule according to what has already been decided. This is a loose statement of the principle of stare decisis. Literally, stare decisis means to abide by what has been decided and is one way of assuring consistency in the legal system. It would be potently unfair if two persons with the same problem received different judicial solutions from different courts.

The Legal Principles below then are generalized statements of American law regarding parental responsibility for children. Students should understand them and then attempt to use them to answer the questions accompanying the hypotheticals below. The principles concern themselves primarily with the legitimacy of a child because this is the factor which determines whether its father must support it, to what extent and whether (and from whom) it may inherit.

## LEGAL PRINCIPLES

1. A child is legitimate when it is born or begotten during the lawful wedlock of his parents.

2. The children born of a void marriage are legitimate if one or both of the parents entertained a bona fide belief that the marriage was a valid and subsisting one.

   Void here means a marriage which has not been properly contracted for some reason (if one of the parties was already married, for example) and which therefore has no legal effect. Bona fide simply means "in good faith" in Latin and is used here to convey that one or both parents honestly believed they had entered into a legal marriage. If one partner was already married but did not tell his/her new spouse, that spouse would have a bona fide belief that he/she was legally married.

3. It is presumed that a child born during wedlock is legitimate; however this presumption may be overcome by competent evidence to the contrary.

   Legitimacy requires that the child's parents be married to each other, not merely married. So if a woman conceives by a man other than her husband, her husband may attempt to prove that he is not the father of her child and have it declared illegitimate.

4. The father as well as the mother of an illegitimate child must give the child support and education suitable to his circumstances.

5. An illegitimate child may by law inherit from his mother as her child even if there is no will.

6. An illegitimate child cannot inherit from his father unless the father acknowledges his parenthood.

7. If a child is born prior to the marriage of his parents, the child will be legitimated by the subsequent marriage of the natural mother to the natural father; hence the child will be deemed to be legitimate from birth.

8. The father or mother of an illegitimate child may adopt the child into his/her own family, provided he/she has the consent of his wife (not mother of the child) or her husband, and thereby legitimate the child.

## HYPOTHETICAL CASES

A. John and Mary participated in a marriage ceremony presided over by the Reverend Mr. Ike of the Church of the Last Happiness. Ten months later Mary gave birth to a son, Jim. One year later John and Mary discover that the Reverend Mr. Ike is not indeed an ordained, certified clergyman, and the Church of the Last Happiness is solely a creation of the good Reverend Ike.

1. What is the status of John and Mary's marriage?
2. Is the child legitimate or illegitimate?
3. What legal principles must be applied to answer the above questions?

B. Assume that the facts presented in "A" above are true, and further assume the following:

John and Mary, learning of the problem that existed because of the marriage ceremony, re-marry in a ceremony performed by the Honorable Robert Jackson, Judge of the Superior Court of Mercer County, New Jersey.

1. What effect, if any, does this re-marriage have on the determination of legitimacy in regard to their son Jim?
2. What legal principle(s) must be applied to answer the preceeding question?

C. Assume that the facts presented in "A" and "B" above are true, and further assume the following:

Two years after the re-marriage ceremony, another child, Jane is born to Mary.

1. Is Jane legitimate or illegitimate?
2. What legal principle must be applied above?

D. Assume that the facts given in "A", "B" and "C" above are true, and further assume the following:

Two months after the re-marriage ceremony, John joins the Navy and is immediately sent to the Arctic. He does not return home until one month after baby Jane's birth.

1. Is Jane legitimate or illegitimate?
2. What legal principle must be applied in answering the above question?

3. John contends that the child is illegitimate. Is his contention correct?

4. What legal principle(s) support(s) John's contention?

5. If John is correct in his contention that baby Jane is illegitimate, who, if anyone, bears the legal responsibility to support and maintain the child, and to what extent?

6. What legal principles must be applied in answering the above question?

E. Assume that the facts presented in "A", "B", "C" and "D" above are true; further assume the following:

Ron acknowledges that he is the father of baby Jane. Ron is married to Betty.

1. Is the baby, Jane, legitimate or illegitimate?

2. How may the child be legitimized?

3. What legal principle(s) must be applied?

F. Assume that the facts presented in "A" through "E" above are true; further assume the following:

Ron and Betty together own real estate. Ron and Betty die simultaneously in an airplane crash. Ron and Betty have no will.

1. What are baby Jane's rights, if any, to Ron and Betty's property?

2. What legal principles must be applied?

G. Assume that the facts presented in "A" through "E" are true (not "F"); further assume the following:

John and Mary together own real property. John dies of a heart attack. Later Mary dies in a car accident.

1. What are Jim's rights to the property?

2. What are Jane's right to the property?

3. What legal principle(s) must be applied to answer the above?

## CUSTODY AND SUPPORT OF CHILDREN

As was mentioned in the Introduction to this chapter, family law is usually enunciated in the context of divorce or separation proceedings, that is, when the family structure has broken down. While this is true of the law with regard to parental custody of minor children, some basic legal principles have evolved governing the rights and responsibilities of parents.

Under old English common law a father had a right to custody of his children which took precedence over a claim to them by anyone else. In present-day America, however, mothers normally have an equal right to custody and are often given preference in custody contests over very young children and female children. In fact, about 90% of children of separated or divorced parents live with their mothers. The parent who does not have custody is usually given visitation rights. Similarly, in thirty-one states and the District of Columbia both parents have an equal obligation to support their minor children. Other states place the burden of support entirely on the father, or place it on him alone unless he is unable to fulfill this duty when the mother is obliged to take over.

The obligation to support is defined as providing children with necessities. Necessities always include suitable food, clothing, shelter, medical care, and education. What is "suitable" for any particular child depends upon the circumstances of his family: a court may find certain things "necessary" for the support of a child whose parents are wealthy which do not apply to one whose parents are poor.

Besides imposing an obligation for support upon parents, the law also makes provision to remove children from parents who mistreat or neglect them and usually makes parents liable for willful damage to property and injury to persons by their minor children. The States have set monetary limits on this liability ranging from $100 to $2000. Finally, parents normally have the right to custody and control over the earnings and services of minor children.

The modern trend in America is to provide for government intervention when a family is unable to support its children. This is done through a program called Aid to Families with Dependent Children (AFDC), better known as "welfare". AFDC is designed to provide financial assistance to "needy" children and their families. A child is needy if one of its parents - usually the father - is continually absent from home, completely incapacitated, or dead, and if the family's income falls below minimum levels set by each state.

The first of these criteria in particular has been the subject of severe criticism because it may force an unemployed father who cannot find work to leave home so that his family will be entitled to assistance. Some states have attempted to mitigate this sorry state

of affairs by enacting a provision which enables an unemployed father to remain at home if he participates in special work and training programs mandated by the federal government. Still, AFDC laws tend to subject the poor to inequities and humiliations not suffered by the rest of society, at least partly fostered by the attitude on the part of some that those on welfare are receiving "handouts" which they don't really deserve.

## ACTIVITIES

The above discussion is a very brief, generalized account of the state of the law on custody and support. It would be most instructive for students to learn what the particulars are in their locale.

1. Have students, individually or in groups, contact domestic relations lawyers or judges (your local bar association could probably recommend some) to find out:

   a. Who has the primary obligation to support minor children? What constitutes "support"?

   b. What are the penalties for abuse or neglect of children? How are they enforced? What procedures must be followed to remove a child from "unfit" parents? What constitutes "unfitness"?

   c. Who is liable for property damage and/or personal injuries by minor children and to what extent?

   d. Who has the right to a minor's earnings and to what extent?

   e. What are the provisions of your state's AFDC program? How is the program administered in your state and by whom? What recourse does a person have who feels his rights are being violated under AFDC provisions? (A social worker might be of special help in answering these questions.)

   Or invite a lawyer and/or a judge and/or a social worker to your classroom to answer these and any other questions the students may have prepared.

2. Invite a social worker to discuss with your class the nature of and philosophy behind the welfare laws in your state. Do students feel it is the obligation of the government to assist those who are unable to support themselves? Explore with the social worker (or with a lawyer or judge) alternatives to government assistance. Do students feel welfare recipients are getting a "free ride" to which they are not entitled at the taxpayers' expense? After their discussion with the social worker, ask students to compile a list of benefits received by persons on welfare. Are these offset by any disadvantages? If so, what are the disadvantages?

3. Have students research and debate (with or without community resource persons) the following: the American government has rightly recognized that it has the obligation to provide for those who cannot provide for themselves, but because welfare assistance covers only basic necessities -- food, clothing, shelter (medical care being administered under Medicaid, etc.) -- the children of welfare recipients are often likely to be little better prepared to compete in universities and for jobs than their parents. Government should, therefore, undertake to educate every poor child in the trade or profession of his choice.

Under normal circumstances a child resides with his natural parents who support and care for him until he can do so himself. Divorce or separation, poverty, illness, or death may cause situations in which parents cannot perform these functions, and a legal question arises about who should have custody of -- who should support and care for -- a child until his maturity. A court may be asked to decide, and when it does so it attends to all the circumstances of the case before it. The crucial factor, however, is the best interests of the child. It is on this basis that the Court will determine who should have custody.

The story below describes a situation which actually happened and in which the Supreme Court of Iowa was asked to decide who should have custody of Mark Painter.

## MARK PAINTER'S STORY

Mark Painter was 7 years old. His mother and little sister had been killed in an auto accident leaving Mark and his father Harold behind. Harold Painter who lived in California asked his mother- and father-in-law to take care of Mark and he sent Mark to live with them in Iowa.

Mr. Painter later re-married and wanted to take his son back, but his in-laws, the Bannisters, refused to let the little boy go. Mr. Painter filed suit in an Iowa court asking for custody of his son and the court granted his request. The Bannisters, however, appealed the case to the Supreme Court of Iowa which then had to decide whether Mark ought to live with his real father and his new wife or with his grandparents.

Mark's grandparents' home is a "well-kept, roomy, and comfortable"[23] one in rural Iowa. Mr. Bannister is agricultural information editor for the Iowa State University Extension Service; he is a member of the local school board and teaches Sunday school. Jeanne Bannister (Mark's mother) went to college in Iowa, then took a position with a newspaper in Anchorage, Alaska where she met Harold Painter whom she later married. Her will named him guardian of their son.

Painter had been born in California. His parents were divorced when he was 2½ and he was placed in a foster home: he considers the McNellys, his foster parents, as his family though he has some contact with his natural parents. Painter flunked out of high school and trade school but for lack of interest rather than ability. At age 17 he joined the Navy, but asked for and received an honorable discharge when he learned that he didn't like it. After taking his high school diploma equivalency examination, he attended 2½ years of college before going to work for newspapers first in Washington, then Alaska.

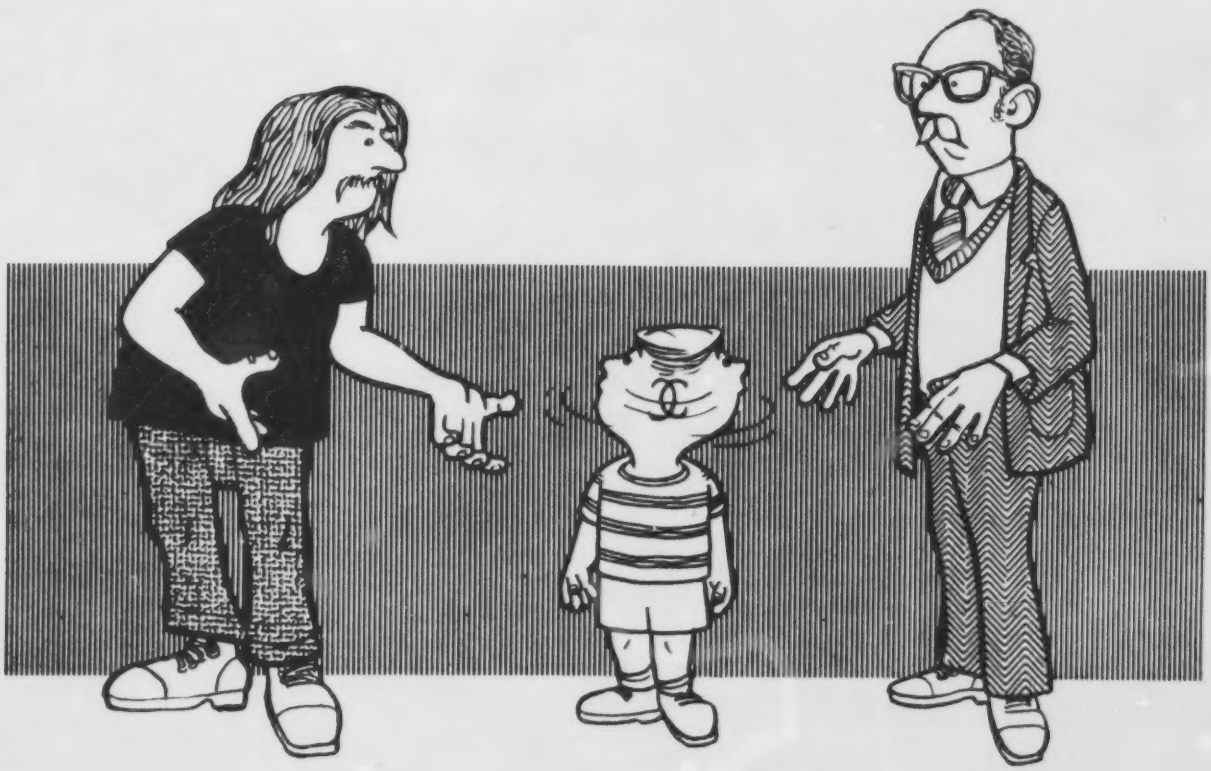
---

23 All quotes in this story are taken from Painter v. Bannister, 258 Iowa 1390, 140 NW2nd 152 (1966).

His ambition is to be a free-lance writer and photographer. He has had seven job changes in two years: he was asked to leave two positions, didn't like two, left two to devote more time to writing, and one to get better pay. His house "is not painted on the outside because I (Painter) do not want it painted. I am very fond of the wood on the outside of the house."

Painter is an agnostic, very much influenced by Zen Buddhism, and a political liberal. His present wife is a cinema designer and seems very enthusiastic about having custody of Mark.

*On the basis of this much information who, in your opinion, should have custody of Mark, his father or his grandparents? Why? Write a paragraph or two giving clear reasons for your decision.*



The information above provided the basis for the Iowa Supreme Court's decision with one significant addition: this Court relied heavily on the testimony of Dr. Glenn R. Hawks the Head of the Department of Child Development at Iowa State University. Although Dr. Hawks' credentials were excellent -- he served as program consultant to the White House Conference on Children and Youth (1960) and as education consultant to Iowa's Head Start program -- the court below (where Mr. Painter first brought suit) had discounted his testimony because of his exaggerated statements and his attitude on the witness stand. On appeal, however, the Supreme Court gave great weight to his testimony and he was the only child psychologist who had testified.

Dr. Hawks said that Mr. Bannister had become Mark's father figure, that they had developed a father-son relationship, and that Mark would have to start from scratch to build a relationship with his natural father. It was his opinion that the probability was high that Mark "would go wrong if he were returned to his father" based on studies done on adopted children with a history of instability. Dr. Hawks felt that stability was Mark's first-priority need, and based on an investigation of the Bannister home (he never visited the Painter home) he thought that the Bannisters could best provide it.

*Does the doctor's testimony change your opinion on who should have custody of Mark? Give reasons for your thinking.*

*Does the knowledge that the lower court discounted Dr. Hawks' testimony while the Supreme Court gave it particular emphasis affect your opinion?*

*Dr. Hawks' services were engaged by Mr. & Mrs. Bannister. Does that affect your opinion?*

*Spend some time with other members of the class discussing your opinions and reasoning about how the question of Mark's future should be decided. Are there any things you don't not know which would have an important bearing on your decision? What are they? Do you feel competent to make this decision? Can you predict what the Supreme Court's decision is going to be?*

PAINTER V. BANNISTER, 258 Iowa 1390, 140 NW2nd 152 (1966)

The facts above were those of Painter v. Bannister, decided by the Iowa Supreme Court. The Supreme Court awarded custody of Mark to his grandparents, the Bannisters. Excerpts from the decision:

> "It is not our prerogative to determine custody upon our choice of one of two ways of life in their normal and proper limits and we will not do so. However, the philosophies are important as they relate to Mark and his particular needs...
>
> The Bannister home provides Mark with a stable, dependable, conventional, middle-class, middlewest background and an opportunity for a college education and profession, if he desires it. It provides a solid foundation and a secure atmosphere. In the Painter home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable...
>
> We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child."

For Further Discussion:

1. Evaluate the decision of the Iowa Supreme Court. What do you think were the bases for its decision? How do they differ, if at all, from yours?

2. The Court says: "It is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits..." How else could they determine custody? Is it true or not that in order to determine custody according to a child's "best interests" a judge or judges must make value judgments about what sort of an environment is "best" for a child? Are judges always competent to know what's best for a child?

3. Given that judges and lawyers have expertise in the law and not in psychology or education, do you think it would be a good idea to have custody decisions made by a panel of professionals from various fields -- a lawyer, a psychologist, and an educator for example -- rather than by jurists exclusively? Give reasons for your answer.

4. The Iowa Supreme Court made its custody determination according to the "best interests" test: the Court asked itself how it could serve Mark's best interests. Do you think that application of the best interests test curtails the rights of parents like Mr. Painter?

5. Consider the following and decide whether it would be better for courts to determine custody on the basis below instead of the "best interests" basis:

   Custody of a child should always be awarded to a natural parent over anyone else unless it can be proved that the natural parent is unfit.

   Give reasons for your answer. What would have happened, do you think, if this standard had been applied in the Painter case?

6. Do you think the result of this case would have been different had it be heard in New York City? Why?

7. Harold Painter was described as an agnostic and political liberal while Mr. Bannister, a school board member, taught Sunday school. Do you think these facts had bearing on the Iowa courts decision? Why? Should they have any bearing on it? Would they have had any bearing on the case had the judges used the "unfitness" test described in Question 5?

8. React to the following:

   "For a court to deny parents custody for such reasons (political, religious views) in effect enables the state to punish parents indirectly for constitutionally protected behavior for which it could not punish them directly."[24]

9. The same Law Review article states that "The views of a single expert witness retained by the grandparents should hardly be sufficient to allow a court to make a complete and informed judgment on the consequences of transferring custody, especially since the trial court had discounted his testimony." Why does the author feel this way? Do you agree?

---

24 Harvard Law Review 1710 at 1715 (1966).

10. The way the Iowa Supreme Court decided this case was by reading the record, then rendering its decision. Had it felt, however, that there was insufficient evidence to make a determination, there were at least three other ways of handling the matter. What do you think the Court should have done? Why?

_____ Read the record and made a determination. (This is the procedure it actually used.)

_____ Sought independent guidance or consultations with other child psychologists, then decided the case.

_____ Appointed counsel for Mark to argue on behalf of Mark's best interests.

_____ Remanded (sent the case back) to lower court for further evidence. Then there would have been another lower court hearing and decision.

## CHAPTER III

# DISSOLVING THE RELATIONSHIP

### INTRODUCTION

While the law may adopt a policy of non-interference in marital and family matters unless and until some breakdown in the relationships is manifested, once that breakdown occurs reams of statutes and case law exist to direct the dissolution of the relationship. There are complicated laws covering where and when a divorce may be obtained and on what grounds; governing the equitable payment of support and division of property; and courts which determine which partner shall have custody of the children. Enunciation of all of these laws does not fall within the scope of this book's purpose. Rather, this chapter intends to provide students with an understanding of the philosophy behind divorce law as it is evolving today, and with some idea of what is necessary to obtain a divorce in most jurisdictions.

In addition, Chapter III will briefly explore the concepts of judicial separation and annulment.

The following article by Shana Alexander originally appeared in her book State-by-State Guide to Women's Legal Rights. As its title indicates, the book is especially concerned with the legal rights of women, but its explanation of the present state of divorce law in America is accurate and clear.

## WHEN I WANT A DIVORCE

Marital bliss-marital misery: two sides of a single coin. Even way back when the coins were shekels or shark's teeth, society has always had to provide escape routes for those who find themselves unfairly or intolerably mated.

In recent years our divorce rate has been zooming skyward. According to 1974 Census Bureau figures, the American divorce rate has increased as much since 1970 as it did in the ten years from 1960 to 1970. There were thirty-five divorced persons per thousand in 1960; forty-seven per thousand in 1970; and sixty-three per thousand as of March 1974.

Is it true that the entire institution of marriage is really breaking down, as some doomsayers suggest? Or are today's husbands and wives unwilling to put up with the same levels of marital stress that their parents somehow found tolerable and their grandparents accepted as a normal part of the matrimonial condition? Probably the latter. But the fact is that more than a third of U.S. marriages now end in divorce. California's over-all divorce rate is better than 50 per cent annually, and in some sections of this our most advanced and future-shocked state, the rate is 120 per cent, which apparently means that for every five marriages there are six divorces. (This dazzling statistic comes from the all-American bedroom community surrounding Disneyland.)

The laws of each state provide two possible ways to get rid of an unwanted husband or wife: divorce or annulment. A divorce presupposes a valid marriage and ends the marriage. An annulment says the marriage wasn't legal in the first place and therefore does not exist. Thirty-four states and the District of Columbia have statutory provisions for judicial separation, a halfway measure that permits husband and wife to live apart yet still retain many of the legal rights and obligations of marriage - support duties and prohibitions on remarriage, for example. Sometimes a separation is a prelude to divorce, but just as often it is prolonged indefinitely if no time limit has been set... .

Two kinds of behavior during marriage are grounds for divorce. The first encompasses adultery, desertion, conviction of a serious crime (robbery, murder, or rape), nonsupport of a wife by a husband, drunkenness or drug addiction, and "extreme cruelty." Common to all these grounds for divorce is the idea that one spouse is "at fault" - that is, he or she did something which in incompatible with the marriage contract or somehow injured the other partner by his or her behavior. Twenty-five states and the District of Columbia have grounds for divorce that are based exclusively on fault.

The second kind of grounds for divorce include incurable insanity; living apart for a certain period of time, incompatibility (legalese for couples who cannot learn to get on); and in thirteen states - Arizona, California, Colorado, Florida, Hawaii, Iowa, Kentucky, Michigan, Missouri, Nebraska, Oregon, Texas, Washington - the new, liberal concept of "irreconcilable differences which have caused the irretrievable breakdown of the marriage." Here there is no requirement of fault. That is, one of the spouses does not have to prove that the other is "guilty" of violating the marital vows or, as can often happen, be subjected to similar charges made by the spouse contesting the divorce.

Another group of states recognizes both fault and nonfault grounds. Such grounds as irreconcilable differences, irretrievable breakdown of the marriage, or incompatibility are valid, but so are such fault grounds as adultery and desertion. These states are: Alabama, Alaska, Delaware, Idaho, Indiana, Kansas, Maine, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Texas, and Wyoming.

In states with divorce laws based on fault there are several defenses,[1] each stemming from the theory that only an "innocent" spouse in entitled to a divorce. These defenses are connivance, collusion, condonation, and, the strangest of all, recrimination. If, for example, a husband invites a friend home for the weekend and then fabricates an excuse to leave town himself, hoping that when wife and friend are left along together nature will take its course--that's connivance. If the husband and wife plan it jointly but don't tell the unsuspecting friend, that's collusion. Either way, no divorce, assuming one of the parties (or a witness) testifies to these facts in court.

Condonation really means forgiveness. Thus, if a wife seeking a divorce can be shown to have forgiven her husband's

---

1 A "defense" in the legal sense is the reason (or reasons) offered by the person being sued as to why the person suing him should not win.

misbehavior, the divorce will be denied. So, for example, adultery followed by marital sex equals no adultery. If you are planning to charge your husband with adultery, and you think he will actively contest the divorce, be sure you don't get back in bed with him yourself, or at least not until after you get your decree.

Recrimination is a disgraceful concept that is still on the books in a number of states. This defense prohibits a divorce from being granted to a wife even though she has valid grounds if her husband also has some grounds against her and chooses to prove them. For example, if a wife charges non-support, desertion, or cruelty, and the husband countercharges adultery or theft, the divorce will be denied. This is true in Delaware, Georgia, Idaho, Louisiana, Montana, New Hampshire, New York, West Virginia, and Wyoming. In three other states - Alaska, Arkansas, and Minnesota - recrimination is permitted as a defense only to a charge of adultery. One wonders what baroque puritan mentality first figured out that unhappy partners must be yoked in everlasting marital doom because neither one is entirely free of blame.

The fault theory of divorce comes down from the time of Henry VIII, when domestic relations were handled by courts that were part of the church. Divorce, leaving both parties free to marry again, was simply out of the question then. One's only hope was annulment, unless the sins of one partner against the other were so grievous that a limited form of separation called "divorce from bed and board" could be obtained. (This is the origin of our modern concept of judicial separation.)

There are certain encouraging signs that the fault theory of divorce is on its way out. It IS out in those states that have adopted the concept of irreconcilable differences or irretrievable breakdown as the only grounds for ending a marriage. In those states that still have fault divorce laws, the laws create unnecessary problems for both the people involved and the legal system itself. Thus a husband and wife who want to end a marriage are forced to wash their dirty marital linens in public. This may damage the couple psychologically as well as financially. In addition, because the judge, the lawyers, and the divorcing couple often know the charges are being made only to satisfy their state's divorce laws, the legal system itself becomes a mockery, something to be "gotten around." Since this is the only direct experience many people have with the courts, they may come to view the whole legal system as cynically as they do a divorce court.

It is a hopeful sign that the most significant recent divorce-law reforms were first enacted in the nation's two most populous states, New York and California. New York now permits a husband and wife to divorce if they

have been voluntarily living apart, with legal papers to prove it, for at least two years. Not much, it might seem, until you consider that until 1967 New York would accept NO grounds for divorce other than adultery. But the real breakthrough was California's 1970 legislation establishing only two grounds for divorce (or marital dissolution, as it is called there and in other states with similar laws): incurable insanity or irreconcilable *differences*. The latter beautiful phrase simply means that if two adults do not get along together, for whatever reason, society should not deny them the right to get along apart, nor the right to remarry.

California was the first state to replace outright the archaic and punitive fault theory with the mature, non-moralistic concept of marital breakdown, and a few other states have followed its example. This theory of divorce recognizes that in most marriages of any duration, the fault probably lies on both sides, and then proceeds on the assumption that fault is immaterial anyway as long as one of the spouses wants to dissolve the marriage... .

Another important difference between traditional divorce laws based on fault and the "no-fault" laws is the rationale on which alimony and marital property are awarded. Under traditional laws these awards often are determined by which of the divorcing spouses is considered the most at fault. Under the new laws, they are based on the relative economic circumstances of the parties without any regard to the cause for dissolution of the marriage.

Alimony is considered a continuation of the support obligation assumed by the husband -- and in some cases the wife -- at the time of the marriage. (By statute, only the wife is permitted to receive alimony in eighteen states and the District of Columbia; in all others, either spouse is eligible.) These support payments are meant primarily to keep wives from becoming public charges, although in fact it may be the husband who is reduced to a sub-subsistence level. Whether he is or not depends on the basis for awarding alimony, both in terms of whether only the "innocent" wife (or husband) is entitled to ANY alimony and whether the AMOUNT of alimony awarded is related to economic need and capacity as well as to fault. The "guilty" wife may get nothing; the "guilty" husband may have to pay, and pay, and pay.

Not all states with exclusively fault grounds for divorce consider a spouse's guilt when setting alimony payments; eight of the twenty-six states that have such laws do not. However, even in those states that do consider fault, the amount of the alimony award usually depends on a number of other things besides guilt: the life style to which the couple has become accustomed; the length of the marriage; age; health; child-care responsibilities; financial

status; and potential for employment. In four states (Maryland, North Carolina, South Carolina, and Wisconsin), however, a spouse who wins a divorce because of the other's adultery is not obligated to pay, no matter how great the other spouse's need.

If an ex-wife wants to remarry she will usually have to give up her alimony, since it is a continuation of a husband's support obligation. The spouse receiving alimony payments must report them as income; the one making the payments is entitled to claim them as deductions.

In California, alimony has been replaced by "spousal support," which is awarded solely on the basis of need. This corresponds with the replacement of divorce with dissolution proceedings whereby neither spouse is considered the guilty party. If at the time of the dissolution a wife has substantial property of her own or is capable of supporting herself, she will receive either no support or a minimal amount if it is necessary to help her prepare or retrain herself for employment. The period of spousal support has also been re-evaluated. Under the old laws the ex-wife could have received alimony until her death or remarriage; now she gets support only for a specific time, determined by her earning ability and the length of her marriage. Also, if the husband is unable to support himself and his wife has the ability to pay spousal support, she will be ordered to do so by the court.

Under the laws of all states, the amount of alimony remains open to modification by the court. If a previously unemployable wife gets a job, for example, the alimony her ex-husband is paying may be reduced or eliminated altogether. Or, if a woman whose ex-husband could afford to pay next to no alimony at the time of their divorce can prove her need and his increased income, the court will increase the alimony. Even when no alimony is awarded as part of a divorce decree, generally the more affluent spouse is ordered to pay "suit money" (temporary alimony) to the dependent spouse while the suit is pending.

The property settlement is the aspect of divorce that most often requires the assistance of a lawyer and keeps countless lawyers in business. There are two basic approaches to the division of property, depending on whether the couple lives in a community-property or a common-law marital property state.

In the community-property[2] states, each spouse is generally entitled to half the community property at the time of the divorce, although there are some variations depending upon the grounds for divorce. In California, however, each spouse is automatically entitled to one-half the property unless such an equal division would be grossly unfair. For example, a woman with four young children, no job, and an ex-husband with a good income will probably get more than half the community property.

The great majority of states--both common law and community property--authorize the courts to divide the property in a divorce action according to what it decides is just. In this way many courts in the common-law states have come up with results comparable to those arrived at in the community-property states. Undoubtedly though, the most equitable results are achieved under entirely no-fault provisions... .

The custody of minor children is decided in every state on the court's judgment of what will be best for the child;[3] the parents' wishes are part of the court's criteria, as are the child's, if he or she is thought to be mature enough to make a sound decision. So even though there is a presumption in many states that older girls or very young children of either sex should be placed with the mother, this is not stipulated by statute, leaving the court free to make its determination on the basis of other factors it may consider relevant in each case. Child support payments are similarly assigned on the basis of which parent is best able to afford them. Generally it will be the father's duty, as he is usually in the better financial position.

Missouri, Nebraska, Nevada, and Virginia have permitted child custody and support to be included as part of the spouse's alimony and property-division contracts, and Indiana allows such contracts to specify as to the education and religious training of children. But these arrangements are scrutinized very carefully by the court before they are or are not accepted.

Our complex web of overlapping and conflicting state laws has produced the American phenomenon of "migratory divorce." Most states require a year's residence (or at least three to six months, as in a number of states) in the state, and three months in the county, before

---

2 See note 6, Chapter II, for a definition of "community property."

3 See "Custody and Support of Children," Chapter II.

the court may grant a divorce. The purpose of the residence requirement is to determine which state has the paramount interest in the marital status of the parties. (In January 1975, residency requirements were declared to be constitutional in a U.S. Supreme Court case--Sosna v. Iowa--challenging them. One of the grounds for the decision was that to waive residency periods would cause the state to become a "divorce mill.") Two underpopulated states--Nevada and Idaho--went into the divorce busines apparently for purely economic reasons; they require only a six-week residence in the state before granting divorces.

The basic question here is whether a migratory divorce is valid in another state. For example, is a divorce obtained by a woman who leaves her Illinois home for a six-week "residence" in Nevada legal? The Supreme Court has held that a bona fide[4] resident of any state, Nevada and Idaho included, can get a divorce even if the absent spouse never sets foot in that state, providing that sufficient efforts are made to notify him or her that a divorce action is pending, to serve him or her with the appropriate papers, and to provide an opportunity for the other spouse to appear and contest the divorce.

The key words are bona fide, and all those who anticipate later trouble from absent spouses--or perhaps only temporarily accommodating spouses who choose not to appear--are well advised to join a country club, rent an apartment, register to vote, buy a car, and do whatever else they can think of to indicate they do not intend to migrate out of the state the moment their divorce is granted. If the absent spouse is properly served and does not appear in court personally or through an attorney, the divorce will be granted by default. But in order to get alimony, property division, or child support and custody, the woman who obtains a default divorce must go to court in the state where her ex-husband is physically located or, in lawyer's jargon, where she can get "personal jurisdiction" over her ex-husband.

A divorced woman's legal problems are not necessarily ended once she gets her final decree. An ex-wife may have difficulty establishing credit. Her income is treated differently by banks, stores, and other lenders from that of a man in comparable economic circumstances. Often there also is what might be called a legal residue from the divorce, no matter how final it may be--that is, a tendency on the part of creditors to judge

---

4 Bona fide: "In or with good faith; honestly, openly, and sincerely." Black's Law Dictionary, Rev. 4th Ed., 1968.

a divorcee's credit standing on the basis of her ex-husband's, and deny her credit if he has a bad credit rating. If it is ever enacted into law, Title III of the Truth in Lending Act may give some relief to ex-wives--as well as wives and single women--contending with credit discrimination, because it will bar sex discrimination in credit transactions. But it may never become law; after it was passed by the Senate in 1973 it was sent to the House Banking and Currency Committee, and has not been heard of since.

Today it is becoming almost as easy to get divorced as it is to get married. As long as people so often persist in getting married for all the wrong reasons, or before they have matured sufficiently to know what they're letting themselves in for or who they really are, divorce should be as painless as possible. Both partners go through enough emotional trauma during a divorce without having to endure a legal trauma as well.

Questions for discussion:

1. Do you think "the entire institution of marriage is really breaking down?"

2. Ms. Alexander's article notes that "the fault theory of divorce comes down from the time of Henry VIII, when domestic relations were handled by courts that were part of the church." Although some persons and groups retain strong objections to divorce on religious grounds, divorce law is becoming liberalized. What reasons can you think of for this trend? Do you think the trend is a good one? Why? Do you think the state has the obligation to legislate the religious or moral codes of any religious groups? Can you think of other bases for law besides religious conviction?

3. "...If two adults do not get along together, for whatever reason, society should not deny them the right to get along apart, nor the right to remarry." Do you agree? Why?

4. "(These) support payments are meant primarily to keep wives from becoming public charges, although in fact it may be the husband who is reduced to a sub-subsistence level." When many American divorce statutes were first enacted, it was unusual for wives to work outside the home, and their husbands were their sole means of support. What causes can you think of for changes in this situation in recent years? How does the California concept of "spousal support," for example, accommodate these changes?

## CLASSROOM ACTIVITY

Either (a) invite a lawyer, team of lawyers and/or domestic relations judge to come to class to speak or (b) have a team of students interview such people and report to the class. The topic should be divorce law in the state with special attention to the following:

1. What are the grounds for divorce in this state?
2. How long must a person be in residence here before he can sue for divorce?
3. Who is eligible to receive support payments?
4. What factors do courts consider when determining who shall make support payments and in what amount?
5. How is property divided between divorced persons?
6. Is there a state law providing for judicial separation? If so, what are the grounds on which one will be granted?

The resource person should also be asked to explain the court procedures one must follow in divorce litigation.

## CUSTODY, SUPPORT, ALIMONY, AND PROPERTY RIGHTS: Role Play I

Objective: Students will be able to define the terms custody, support, alimony, and property rights; and they will appreciate the relationships among those terms.

Lesson Plan:

Through role-playing, students will learn that the topics involved are inter-related and inseparable. It will be seen that it is the law's function to see to it that all parties involved are properly provided for.

Each role-playing group will have six (6) members. The teacher should select one student in each group to play each of the following parts:

Husband
Wife
Counsel for Husband
Counsel for Wife
Domestic Relations Officer
Judge

It will be each student's task to fulfill the assigned role. Student/husband and student/wife are to double as legal assistant to their respective counsel, providing whatever aid and assistance necessary.

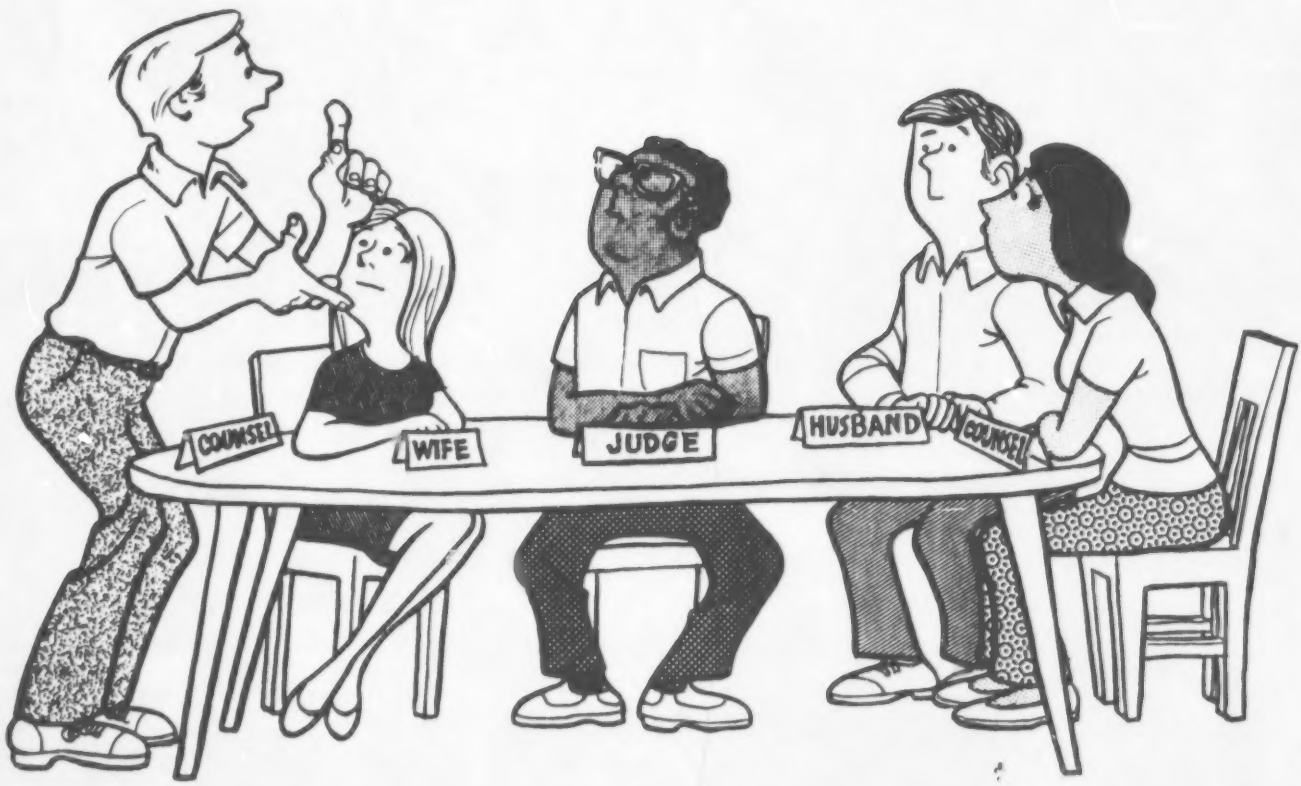
First, the Domestic Relations Officer will hold an informal hearing and make a written report on the hearing to the court. Then Counsel for each party will prepare and present testimony, oral argument and a written report supporting his client's position. The judge will hear the evidence, render a decision and issue an opinion thereon.

Counsel for husband and wife and and the judge will make use of the legal principles which follow. Finally a debriefing session will be held to evaluate the role-play. (See page .)

The following fact situation will be assumed:

> Betty Case and John Case were married on June 14, 1965. They have two children, John who is ten years old, and Lisa who is five years old. Betty Case is employed as a secretary earning $125 take-home pay per week. John is a policeman earning $200 per week net. They own a house with a market value of $30,000; however, they took a 30-year mortgage loan eight years ago upon which they are obligated to pay $200 per month. The parties have agreed to or, if in a no-fault jurisdiction, the court will enter a decree divorcing Betty Case from John Case. None of the other issues are settled. The following issues must be considered:

1. Who gets custody of the children?
2. Visitation rights.
3. Support of the children.
4. Support of the wife.
5. Alimony.
6. How is the property to be divided?



## LEGAL PRINCIPLES

In contrast to the critical analysis of divorce law offered above by Shana Alexander, the legal principles below are general statements of the law applicable throughout most jurisdictions in the United States. Use of lawyers as resource persons should acquaint students with the particulars of the law in their own jurisdictions.

### Custody

1. Neither parent is entitled to custody of the children as a matter of right. The court has the power to determine who is to have custody of the children and to provide for their support.

   The welfare (or best interests) of the children is the chief factor to be considered. The court will take the economic, social, religious and psychological circumstances of a particular case into consideration and act so as to insure proper care and attention for the children. The child's wishes may also be considered if he or she is thought mature enough to choose.

2. It is favored that custody of a child of tender years be given to the mother.

3. If circumstances such as child being of the age to require education and preparation for business, then custody might be awarded to the father.

4. Proof that either party is an adulterer is not necessarily proof of the fact that that party is unfit to have custody of the child or children. Immorality or misconduct by one of the parents may, however, determine to whom the court awards custody if it is reflected in the atmosphere of the home where the child would be placed and, therefore, would affect the child adversely. The court also has the option of giving custody to a third party, such as a grandparent or other relative.

5. The parent having custody of the child has the right to determine and direct the usual activities of the child including his education, religious training, etc.

6. The party not having custody of the child has a right to reasonable and regular visitation.

7. Divorce courts may change custody of a child consistent with the child's welfare. Factors like remarriage of a parent, changes in employment circumstances, and the care the child has received are relevant here.

Support/Children

1. Each party has a duty to support their legitimate unemancipated children with the father being primarily responsible in most jurisdictions and the mother secondarily so. The mother is held responsible when the father cannot support the children or fails to do so.

2. The court may make an order charging either party for support even though custody is awarded to the other party.

3. The support order may be modified from time to time depending on the needs of the child.

4. The amount of support ordered will be determined after consideration of the following factors:

   (a) needs of the child, in terms of maintaining a life style consonant with his parents' station in life;

   (b) ability of the respective parties to meet those needs after taking into consideration the parties' respective obligations.

5. Once a support order is entered it will not be modified except upon further order of the court upon a showing of changed circumstances.

Support/Wife

1. The husband is under a general duty to support his wife.

2. If a wife leaves her husband without legally sufficient justification, she forfeits her right to support.

3. The party liable for support must support the other party and provide "those things needed and suitable to the rank and condition of the spouses and the style of life they have adopted." Gimbel Brothers Inc. v. Pinto, 145 A2d 865, 188 Pa. Super 72, (1958).

Alimony

1. A wife is entitled to alimony for her maintenance pending the outcome of divorce litigation and attorney's fees and expenses incident to this litigation if she can show necessity and there is no evidence of independent means of support.

2. Alimony subsequent to divorce provides the wife with support to which she has a legal right. In some states alimony is available only to wives, in some states, to either spouse.

3. Alimony cannot be awarded to the wife if she is the offending party, that is, if she is at fault in causing the marriage to end.

4. The amount of alimony awarded depends on the wealth of the parties and the needs involved.

5. Remarriage of the former wife to a man capable of providing sufficient support is grounds for terminating a court order for alimony.

Property Rights

1. It is presumed that the wife is the owner of articles adapted to her separate and personal use.

2. There is no presumption by the court about the ownership of property used in common by the husband and wife such as furniture.

3. Wedding gifts, unless especially earmarked, are the joint property of both the spouses.

4. Upon divorce, the ultimate object to be sought is an equitable distribution of property acquired through the joint efforts of the husband and wife. The following are important considerations in making a division of property:

   (a) ages of the parties
   (b) condition of health
   (c) present ability to earn
   (d) amount of resources owned by each or both parties
   (e) contributions of each to the joint accumulation
   (f) duration of the marriage
   (g) indebtedness of each or both
   (h) conduct of the guilty party

## DIVORCE: Role Play II

Objective: Students will be aware of the relevant considerations which are involved in the dissolution of the marital status by divorce.

Lesson Plan:

Role playing will be employed in an effort to have the students develop a familiarity with the grounds, procedures and steps generally necessary to dissolve a marriage. The work dealing with divorce is handled subsequent to the materials dealing with Custody, Support, Alimony and Property Rights for the reason that as a practical matter, the foregoing matters must be dealt with prior to the dissolution.

As in the previous lesson, each role-playing group will have six members. Students will have the opportunity to assume roles different from those they played in Custody, Support, Alimony, and Property Rights. The teacher should select one student in each group to play each of the following parts:

Husband
Wife
Counsel for Husband
Counsel for Wife
Domestic Relations Officer
Judge

It will be each student's task to fulfill the assigned role. Student/husband and student/wife are to double as legal assistant to their respective counsel, providing whatever aid and assistance necessary.

First, the Domestic Relations Officer will hold an informal hearing and make a written report on the hearing to the court. Then Counsel for each party will prepare and present testimony, oral argument and a written report supporting his client's position. The judge will hear the evidence, render a decision and issue an opinion thereon.

Counsel for the husband and wife and the judge will make use of the legal principles which follow. Finally a debriefing session will be held to evaluate the role-play. (See page .)

Assume that the facts presented in Custody, Support, Alimony, and Property Rights Role-Play are true. Further assume the following:

> Betty and John Case reside in the State of X, City of Y. They have resided there for the entire period they have been married. Betty and John have now been separated for two months. Betty left John and went to live with her mother in Z town. Betty has the children.

The Case's problems began when Betty suspected John of being unfaithful seven years ago. A friend of Betty's told her that she saw John go to the Happy Daze Motel with Daisy Bad. Betty found out from the motel manager that John and Daisy stayed in their room for four hours.

When John came home from this episode with Daisy Bad, Betty and John had a serious altercation. In the course of the fight, John told Betty that he didn't love her, called her various obscene names and made numerous allusions to what John alleged to be Betty's questionable ancestry. As a result of this incident, Betty became ill and was therefore under a physician's care for six months after the fight.

After Lisa was born the Case's problems continued. John, as a result of a municipal budget squeeze, was laid off from his job for a period of six months. During this time the family was forced to live from Betty's earnings alone. John, as a result of his idleness, became somewhat cantankerous at home, and began to stay away from home for extended periods of time. When he returned home, he was always obviously "under the influence." This conduct continued even after John went back to work.

Betty still feels that her husband is running around with other women. Betty left her husband two months ago because she says that during a fight, John knocked her down and broke her partial denture plate. John has not given Betty or the children any money since the separation.

Betty consults her attorney in regard to her domestic situation. She reports that she wishes to dissolve the marriage.

## PRINCIPLES OF LAW

1. A divorce will not be granted to a party unless there is testimony to corroborate the testimony establishing grounds for divorce.

2. Divorce statutes normally require that, in addition to a bona fide domicile, proof of residence within the state and county of filing must be established.

3. Each state must give full faith and credit to divorce decrees rendered in sister states.

4. A marriage must exist between the parties in order for the parties to begin an action to divorce.

## GROUNDS FOR DIVORCE

1. Adultery is the voluntary sexual intercourse of a married person with one other than the person's spouse. Circumstantial evidence of opportunity plus a "character such as to lead justifiably to an inference that the opportunity would be taken advantage of" will be sufficient to prove grounds of adultery.

2. Cruelty to be used as grounds for divorce requires the willful infliction of grievous injury on the other spouse.

3. Inhuman Treatment requires physical or non-physical conduct endangering the life of the spouse making the allegation.

4. Desertion requires the willful cessation of cohabitation for a certain continuous period of time.

   (a) The party guilty of the desertion is the party causing the separation, not necessarily the party who physically left the domicile.

   (b) Constructive desertion as a ground is made out when when one spouse leaves the other because the latter's conduct is absolutely inconsistent with the marriage relation and is such to make it impossible to continue cohabitation with safety, health or self-respect and persists over a period of time required by the desertion statute.

   (c) Consentual separation is not desertion unless intent to desert is formulated by one of the parties during that separation.

(d) A bona fide offer to return - or request by the other to return - together with bona fide offer of reformation, if made in good faith before the cause of action for desertion has matured, places the party rejecting such offer in the position of causing any further separation and being deemed the deserter.

(e) The husband may reasonably choose the family domicile. The wife's refusal to live in that place can be construed as desertion.

5. Indignities to the person as a ground for divorce must be supported by evidence sufficient to support the inference that settled hate and estrangement has replaced the love and community upon which the marriage was based.

## DEFENSES TO DIVORCE

1. Connivance is the consent of one party to the commission of the acts alleged as the ground for the divorce.

2. Collusion is an agreement between the parties to create the grounds for an unwarranted divorce decree. Evidence to collusion would include an agreement not to defend a divorce action even though a defense exists.

3. Condonation is the conditional forgiveness of the cause of action for divorce with full knowledge of the existence of a ground for divorce. Where adultery is the ground for divorce a single act of intercourse will suffice to prove condonation.

4. Recrimination - a party may secure a divorce only if he himself has been without fault. In order to be recriminatory conduct, the conduct must amount to one sufficient to be a ground for an independent cause of action in divorce.

5. Limitations - the statute of limitations in most jurisdictions for divorce is typically a set period after the act or discovery thereof, of the grounds for bringing a divorce. After that time, no suit may be brought on those grounds.

6. Laches - defined as "sleeping on one's rights." The defense arises when the delay is such to raise a presumption of condonation.

## Follow-up Discussion on the Roleplays (I and II)

Following each role-play students from all the groups should come together to "debrief." Discussion should center around

(1) how well students played their roles, and

(2) the outcome of the informal hearing and the hearing in court. What did each group decide with respect to each of the six issues? Did their decisions differ? Why? (Each "judge" should here be prepared to summarize his decisions and rationale.)

1. It might be helpful to ask a real-life domestic relations officer or divorce lawyer to participate in the two foregoing activities in the role of observer. This person could provide a valuable critique of the students' role-playing during the de-briefing session.

2. Ask students to research and prepare to debate one or more of the following propositions:

   A. The present system of awarding custody of children to either parent on the basis of the court's judgment of a child's "best interests" treats children as though they were mere property. A better system would require that counsel automatically be appointed for the child of divorcing parents who would argue from the child's viewpoint.

   B. The requirement of alimony or support payments by a husband to his former wife is fundamentally sexist and should be changed so that each ex-spouse is obligated to support him/herself and both contribute equally to the support of the children.

   C. The present divorce procedure in which divorce is an adversary proceeding often requiring one of the parties to prove the other is at fault in some way is unduly damaging to both parties. It should be changed to allow a simple hearing in the presence of a judge providing the parties the opportunity to divorce and settle their financial affairs as amicably as possible.

Two teams of two students should choose or be assigned a topic, one team to argue in favor of the statement, one against. Their preparation for a formal presentation might include library research, consultation with a lawyer, and surveying their local community (by telephone or in person) as to how citizens feel on the issue.

## ANNULMENT

Objective: Students will be able to differentiate between the concepts of divorce and annulment. The concept of the marriage as a contractual relationship will be reinforced.

Lesson Plan:

Short hypothetical cases will be presented to students for their reactions. Students should be able to formulate general legal principles based on background already acquired.

1. Present hypothetical cases to students.

2. Allow students to discuss the facts and their implications. Emphasis should be placed on identifying the factual problem presented and the appropriate legal response to that problem.

3. Students, after discussion, are instructed to enunciate the issues and legal principles suggested by each situation in writing.

STUDENT WORKSHEET

Directions: After class discussion, identify the issue presented by each hypothetical problem and state the legal principle illustrated.

## Introduction

A court of equity will set aside a marriage contract upon proof of the fact that some essential element in it is lacking. The court will be slow to act in the case of a consummated marriage.

### Hypothetical #1

John, who is 15 years of age, marries Mary, who is 9 years of age but looks to be 14 years old. Right after the ceremony, Mary's mom takes Mary home to her house, never to see John again. Two years later, John wants to marry Jane, but realizes that he can't be married to two people simultaneously.

1. Can the first marriage be dissolved?
2. How?
3. On what basis?
4. State the legal principle illustrated.

### Hypothetical #2

Peter participates in a marriage ceremony which is purportedly valid. He marries Nancy, who is a beautiful girl, but who has a certified mental age of 3 years. After 3 days of picking up the toys that Nancy keeps throwing on the floor, Peter gets disgusted and wants to dissolve the marriage.

1. Can the marriage be dissolved?
2. How?
3. On what basis?
4. State the legal principle illustrated.

### Hypothetical #3

Joe marries Jill while on an L.S.D. "trip." Assume that the marriage was facially valid. Assume further that Joe was completely under the influence because of the ingestion of L.S.D. Joe awakens to find himself married to Jill whom he finds to be completely repulsive. Joe seeks to dissolve the marriage.

1. Can the marriage be dissolved?
2. How?
3. On what basis?
4. State the legal principle illustrated.
5. Would your answers to the above questions be different if Jill wanted to dissolve the marriage because she regarded Joe to be repulsive? How?

Hypothetical #4

Jake is married to Jane. It is Jane's second marriage. Jane has a daughter Charlotte by her first marriage. Jake and Jane have a son, Seymour. Seymour and Charlotte get married. Charlotte then falls in love with Bob. Charlotte wishes to dissolve the marriage.

1. Can the marriage be dissolved?
2. How?
3. On what basis?
4. State the legal principle illustrated.

Hypothetical #5

Harold is married to Zelda in a facially valid marriage ceremony. Harold, unbeknownst to Zelda, files a fraudulent health certificate in order for the marriage license to be issued. He does not reveal that he is afflicted with three physically incapacitating venereal diseases. Zelda discovers Harold's condition and urges him to submit to medical treatment as a pre-requisite to normal marital relations. Harold refuses. Zelda wishes to dissolve the marriage.

1. Can the marriage be dissolved?
2. How?
3. On what basis?
4. State the legal principle involved.

Hypothetical #6

Zeke, who had, two weeks previous to his marriage, undergone an irreversible vasectomy, marries Alice. Alice, who has told Zeke that the reason she is marrying him is to have ten children, is assured by Zeke that they will have many children together. Alice finds Zeke's irreversible vasectomy certificate buried in Zeke's underwear drawer. Alice is very hurt and wishes to dissolve the marriage.

1. Can the marriage be dissolved?
2. How?
3. On what basis?
4. State the legal principle illustrated.

Hypothetical #7

Alfred and Frances are found together in Frances' bedroom by Frances' father. Frances' father, at the point of a shotgun, forces Alfred and Frances to get married that night. Alfred hates Frances as a person. Consequently he wishes to dissolve the marriage.

1. Can the marriage be dissolved?
2. How?
3. On what basis?
4. State the legal principle illustrated.

## LEGAL PRINCIPLES

1. Annulment is the setting aside of a marriage contract upon proof of the fact that the marriage contract was lacking in some essential element. The judicial proceedings will, if the action is successful, result in a declaration that a marriage relation never in fact existed.

2. Persons below a certain age do not have the legal capacity to marry. Marriages between such persons may be annulled.

3. Marriages between persons who do not have, at the time of marriage, the mental capacity to understand the nature of the marriage relation and the duties and obligations therein, may be subject to annulment.

4. If a party at the moment of marriage lacks the mental capacity to marry as per number 3 above, by reason of intoxication, the marriage may be annulled.

5. Marriages between persons whose close relationship is based on affinity (step-brother, step-sister, etc.) as well as blood, may be annulled. For example, statutes commonly provide that marriages between parents and children, ancestors and descendents of every degree, between brothers and sisters of the whole as well as half blood, between uncles and nieces, between aunts and nephews may be annulled because of the close relationship between the parties.

6. Marriages between parties where one or both of the parties is physically incapable of performing the duties of marital status may be annulled as long as the deficiency is of a serious nature.

7. Where the consent to marry was obtained by the fraudulent conduct (party accused of the fraud must know of the fact misrepresented or concealed) of one of the parties, the fraudulent conduct will vitiate the other party's consent and render the marriage subject to dissolution by annulment.

8. Where a marriage is the result of socially objectionable pressures on one or both of the parties, the consent to marry may be vitiated by such duress, and the marriage may be subject to dissolution by annulment.

## ANNULMENT

Objective: Legal precepts underlying concept of annulment will be re-stated and reinforced.

Lesson Plan:

Presentation and discussion of actual factual situation to reinforce concepts previously discussed.

1. Teacher reads newspaper article to students.

2. Discussion by class (see suggested discussion questions).

3. Students list applicable legal issued and principles applicable to factual situation presented.

# Forced to Wed, N. J. Man Claims

Copyright article removed by ERIC.

The Philadelphia Inquirer
October 4, 1975

Questions for Discussion:

1. Why is the young man seeking an annulment rather than a divorce?
2. What was wrong with the young man's marriage?
3. Did the young man consent to be married?
4. Did the young man have the capacity to be married?
5. What if anything impaired his capacity to marry?
6. What consent is needed to become married?
7. Who must be the parties to a marital contract?
8. Is the status created by the ceremonial marriage subject to annulment? Why or why not?
9. Assuming that the status created was subject to annulment, what facts would one have to add to the story to make the status subject to divorce?

## CHAPTER IV

# CURRENT ISSUES: ADOPTION, ABORTION, STERILIZATION

### INTRODUCTION

The topics considered in this chapter are current, controversial, and statutorily based. Abortion and sterilization are of current interest because it is only recently that the legislatures and courts have begun to speak to these issues. Adoption, as the legal act by which the relationship of parent and child is established between persons not so related by nature, was unknown to common law and exists solely by virtue of statute.

# ADOPTION

Anyone who has read Charles Dickens will remember meeting many characters in his novels who were orphans left to fend for themselves and make the best life they could -- perhaps by begging or stealing -- until they reached the age of majority. The situation in Dickens' England was reflective of the fact that there was no provision for adoption[1] under English common law.

In America the several states have made adoption laws based on the Roman idea that an adopted child becomes a full member of its new family. But, as Shana Alexander points out, "adoption practices are actually governed less by state adoption laws than by what judges and, more particularly, adoption agencies conceive to be in the best interest of the child."[2]

Adoption agencies are the main instruments through which persons who wish to adopt find a child who needs a home. While some adoption agencies charge for their services, most are run by city, county, or state government and charge only nominal fees, if any. Though many agencies now actively seek adoptive parents for older, handicapped, and minority children this was not always their practice. Twenty-five or thirty years ago a retarded or physically handicapped child would have been considered "unadoptable" and probably fated to spend his or her life in a public institution. Meanwhile "perfect" children -- small Caucasian babies with no defects of any kind -- became a rarer commodity. Because agencies were trying to meet a demand for "perfect" babies which was far greater than the number of babies available, adoptions through regular agencies became more difficult and began to involve more bureaucratic red tape. This has led to a proliferation of "black-market" adoption whereby money (perhaps up to $25,000) is paid, usually to an unwed mother, through a lawyer, doctor, or nurse who received a percentage of the "fee," by people who wish to adopt her child.

While black-market adoptions are illegal for not adequately protecting the rights of the adopted child, "independent adoptions" are ones in which all arrangements are made directly between the natural and the adoptive parents, but in accordance with the state's laws on adoption.[3]

---

1 Adoption is a purely statutory proceeding with the object of terminating all parental relations between a person and his natural parents and the creation of a new legal relation of parent and child between the adopted person and others whom the court approves for that purpose.

2 Shana Alexander's State-by-State Guide to Women's Legal Rights, Wollstonecraft, Inc., 1975, p. 64.

3 Independent adoptions are not legal, however, in Connecticut, Delaware and Illinois.

## ACTIVITY I

## COMMUNITY RESEARCH

The best way for students to learn about the adoption laws and practices in their locale is for them to visit or invite to their classroom an administrator and/or a case-worker from their local adoption agency. This person can then discuss with students the exact procedures necessary to adopt a child and explain the rationale behind them. In general, however, the procedure is as follows:

1. Consent of the natural parents is obtained.

2. The persons who wish to adopt submit an application.

3. The adoption agency conducts an investigation into the suitability of the applicants as adoptive parents.

4. A judicial hearing occurs where the judge, if he is satisfied that the consents are valid and that the investigation has shown the adoptive parents to be satisfactory, grants an interlocutory (provisional) decree of adoption.

5. The child is placed with its adoptive parents.

6. The final decree is granted and a new birth certificate is issued the child in the name of its adoptive parents. At this time, all rights of the natural parents with respect to the child are irrevocably terminated, and all records relating to the adoption are sealed, never to be opened unless by court order.

A resource person from an adoption agency will, of course, be able to supply specific information pertaining to your state. Some areas for discussion are detailed below:

1. Are there any restrictions on who may adopt?
   *What is the policy with regard to single persons who wish to adopt? Interracial adoptions? Does the agency attempt to place children with adoptive parents of the same religious faith as the natural parents?*

2. Whose consent(s) are required from natural parents before adoption can take place?
   *The Supreme Court ruled in 1972 that an unwed father has a say in the custody of his illegitimate child. (Stanley v. Illinois, 405 U.S. 645 (1972).) Has this affected the agency's practices?*

   *What problems arise when parents who have abandoned or neglected their children refuse to consent to their adoption? Why does this occur and what possible solutions are there?*

3. When are the rights of the natural parents with respect to the child irrevocably terminated?

   *What problems can arise if the rights of the natural parents are not terminated until the adoption becomes final?*

   *Some states provide for termination of natural parents' rights before a child can be made available for adoption. What are the advantages and disadvantages of this procedure?*

4. How long is the waiting period before an adoption becomes final?

5. What sorts of questions must the prospective adoptive parents answer on their application?

6. What type of investigation is conducted to determine the suitability of the adoptive parents? Who conducts the investigation?

Other suggestions:

Prior to the discussion with the resource person, one or more students might go to a law library to find out what statutes govern adoption in their state.

If the adoption agency is willing, one or more students might go there to act as observers or volunteers to learn how the agency works.

If time and energy permit, students could interview persons from more than one adoption agency to compare practices.

## ACTIVITY II

### MOOT COURT: IN RE WATSON

In the following simulated court proceeding, the question to be determined is whether an 18-year-old girl can regain custody rights to her daughter after having relinquished those rights four years earlier.

The simulation should take place in the following sequence and will take several classroom days:

1. Assignment and discussion of roles.

   Students who do not have roles to play will act as observers. These students will watch carefully as the simulation progresses to note the interplay between attorneys and clients, among the judges, and to evaluate the arguments of the lawyers for both sides and the judges' decision.

2. Preparation time.

   Copies of the "Fact Sheet," below, should first be distributed. Students read the facts of the case thus far, then break into small groups to begin the simulation: attorneys meet with their clients; then prepare arguments; judges meet to review facts of case; and one or more observers should be dispatched to each group.

3. Moot court convenes: attorneys for each side present arguments before the Supreme Court of Pennsylvania.

4. Judges retire to chambers to decide the case, then render their decision. Any judges who agree with the majority but on the basis of different reasoning may issue concurring opinions. Any judges who disagree with the majority may file dissenting opinions.

5. Debriefing with observers offering their evaluation of the simulation.

FACT SHEET: In Re Watson

On December 12, 1968 Denise Watson gave birth to Stephanie Watson at the Presbyterian Hospital in Philadelphia. She was then an unmarried fourteen-year-old tenth grade student at Gratz Neighborhood High School. The acknowledged father, who was sixteen years old on the day of the infant's birth, is Leon Van Randolph, Jr.

On December 23, 1968 Denise relinquished custody of her infant daughter to the Children's Aid Society of Philadelphia. On April 7, 1969 she signed a petition for the voluntary relinquishment of parental rights with regard to the infant Stephanie. Denise and her mother, Mrs. Janet Watson Bull, attended a hearing before the Honorable Hazel H. Brown on April 30, 1969 concerning the petition for relinquishment. Denise and her mother each offered testimony indicating that they understood the relinquishment proceeding and the finality of their decision.* The petition was granted: Denise gave up all further rights to her daughter.

*COURT=JUDGE BROWN; APPELLANT=DENISE WATSON

"THE COURT: Do you realize if this petition is granted, you forever give up all your rights to the baby?

APPELLANT: Yes.

THE COURT: The Children's Aid Society will then have the right to place her in a home for adoption and when there is a hearing on that petition, they will have the right to consent without any notice to you?

APPELLANT: Yes.

THE COURT: And do you agree to that?

APPELLANT: Yes.

* * * * * * * * * * * * * * * * * *

THE COURT (to Mrs. Janet Watson Bull, appellant's mother): Do you approve of having this baby placed for adoption?

ANSWER: Yes."

On January 26, 1971 Denise Watson Randolph** petitioned the court: this time she asked Judge Brown's court to vacate, or set aside, the decree of voluntary relinquishment to the parental rights to her daughter. She wished, in other words, to regain custody of the child. Judge Brown held an evidentiary hearing on June 30, 1971; then on November 3 of that same year refused to grant this second petition. The question now before the Supreme Court of Pennsylvania

** Denise Watson and Leon Van Randolph, Jr., were married on September 18, 1971.

is whether Judge Brown was correct in denying Denise's petition to regain custody of her child.

The appropriate section of Pennsylvania's Adoption Act, in effect at the time Denise relinquished the rights to her daughter, is given below:

> "When any person under the age of eighteen years has been in the care of an approved agency or institution for a minimum period of five (5) days, the parent or parents of such person may petition the court. . . for permission to relinquish forever all parental rights to such person. . .
>
> The court shall thereupon fix a time for hearing. . . At such hearing, the court, by examination under oath of the parties to the petition, shall ascertain the truth of the facts set forth in the petition and its execution, and if satisfied as to the truth thereof and that the petition should be granted, it shall issue its decree so finding, and (1) directing the transfer of the custody of the person to the approved agency or institution, and (2) authorizing such agency or institution to give consent to the adoption of such person without further consent of or notification to the parent or parents."

ROLES

Chief Justice Jones )
Justices Eagen )
O'Brien )
Roberts ) Justices of the Supreme Court of Pennsylvania
Pomeroy )
Nix )
Manderino )

Denise Watson Randolph: You are now 18 years old and married to the father of the baby you bore out of wedlock when you were 14. You were counseled by caseworkers of the Episcopal Children's Service throughout your pregnancy and during the period between your daughter's birth and the date of the voluntary relinquishment. During the last four months of your pregnancy you attended a high school for teen-aged, unwed mothers. You decided that when your baby was born, the best thing to do would be to give it up and allow another couple to adopt it.

Janet Watson Bull: You are Denise's mother and a deaf-mute since birth. At the hearing before Judge Brown on April 30, 1969, however, you gave testimony which was translated and indicated that it was your desire that Denise give up parental rights to her daughter Stephanie. On June 30, 1971 you testified why you had earlier supported your daughter's desire to give up her child:

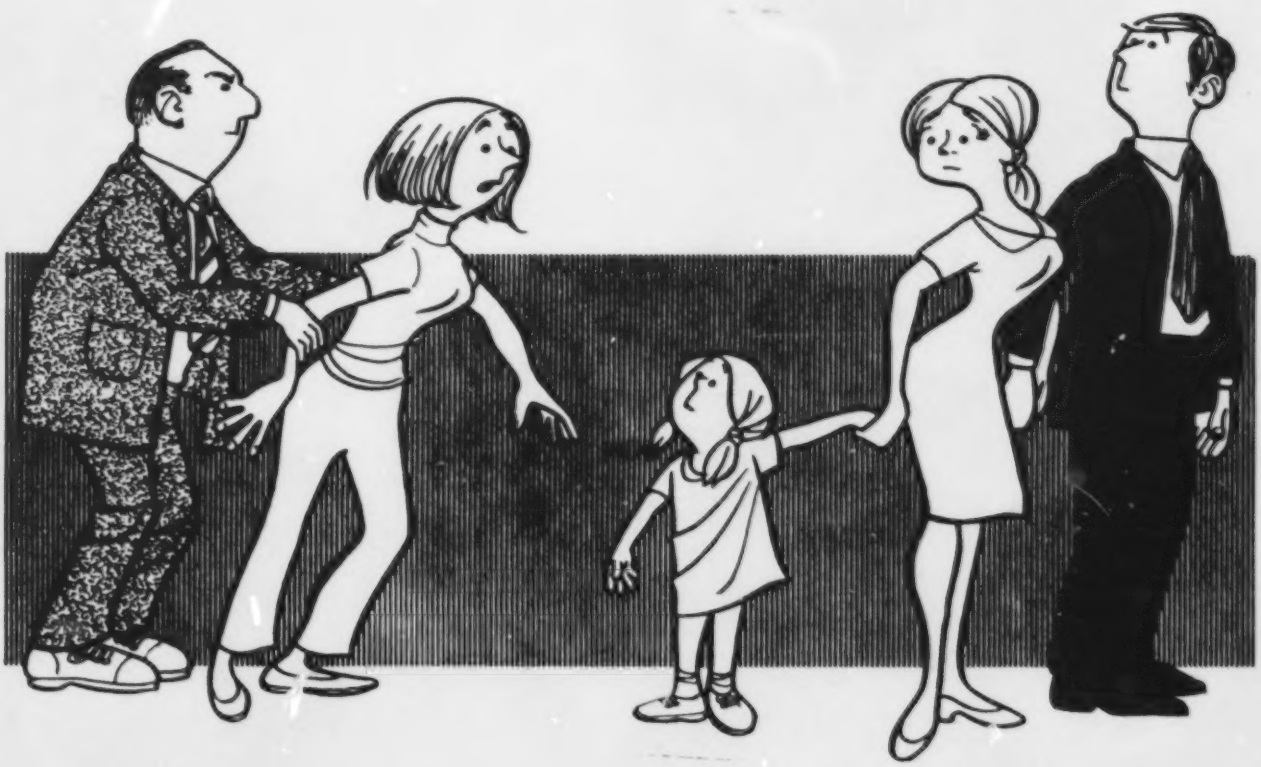
> "I thought the baby would be placed with a mother with a good income, with a comfortable home, and not with a poor person from bad surroundings. A person with money, a nice home and a place for the baby. *I went to the hearing because I was expecting the baby to be placed in a good home.* . . . ." (Emphasis added)

Grace C. Kennedy: You are the lawyer for Denise Watson and her mother. You will argue in court that Denise's consent to the petition of relinquishment was not "voluntary, intelligent, and deliberate" because she was only fourteen years old when she sought to give her baby up, because she had lived in a foster home during the last four months of her pregnancy due to an inability to live at home with her mother, and finally because she was unaware of the alternative to giving up her child permanently. To support these arguments, you may want to cite and refer to the Susko Adoption Case (363 Pa. 78, 69 A.2nd 132 (1950)). In Susko the Court held that an 18-year-old girl's consent for the adoption of her child was involuntary and therefore not valid or binding because it had been given very soon after the death of her mother and while under coercion from her brothers.

You will also argue that the relinquishment proceeding did not afford Denise procedural due process of law as guaranteed by the 14th Amendment to the Constitution. You contend that the hearing was "a very short one" in which "only a few routine questions were asked." Further you ask that the Court extend the right to representation by counsel, afforded juvenile defendants by In Re Gault (387 U.S. 1 (1967)) to juveniles who are not criminal defendants, but who stand to forfeit "substantial rights."

Walter Helpman: You represent the Children's Aid Society of Pennsylvania which placed Denise's daughter with adoptive parents after Denise relinquished the right to her child.

Peter M. Mattoon )
Benjamin R. Neilson)
Charles J. Peischl ) You are the attorneys for the Children's Aid Society of Pennsylvania. You will argue that the testimony given by Denise and her mother at the first hearing before Judge Brown indicates that both understood the finality of their decision and that the hearing was held in accordance with the procedure prescribed by Pennsylvania's adoption statute. You contend that even though Denise and her mother have changed their minds about having custody of Denise's child, the consent which they gave originally was valid and there is no cause to remove the child from the care of the adoptive parents with whom she has been living for three years.



In Re Watson

450 Pa. 579, 301 A.2nd 861 (1973)

Below are reprinted excerpts from the actual opinion of the Pennsylvania Supreme Court in this case, followed by some questions which might be explored during debriefing:

> Despite the pathetic consequences for appellant, there is no provision in the ... Adoption Act intended to accommodate the hindsight of the natural parent or her guardian. The ... Adoption Act prescribed that the court rendering a decree of relinquishment direct the transfer of custody of the child to the authorized agency and give authority to the agency to consent to the child's adoption *without further consent of or notification to the parent or parents.*" Without such a proviso, the prospective adopting parents would have "to assume the risk of a change of mind by the natural parents before the adoption could be legally accomplished ..." Hildenbrand Appeal, 405 Pa. 579, 582, 176 A.2d 900. 901 (1962). The express language of the former act and this Court's decision in *Hildenbrand* underscore the necessity for finality in the natural parent's decision to extinguish her rights in the once relinquished child.
>
> We hold that appellant and her mother gave "intelligent, voluntary and deliberate" consents to relinquishment. That each has changed position does not permit us to disturb the finality of the initial decision.
>
> Appellant asks that we extend the right to representation, afforded to juvenile defendants by In re Gault, 387 U.S.1, (1967), to juveniles who are not criminal defendants, but who stand to forfeit "substantial rights." *Gault* extended the right to counsel to juveniles in "proceeding(s) where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty. . ." *Gault* is inapposite in this setting. We are not compelled to afford juveniles the right to representation in civil proceedings by the authority of *Gault.*

> We therefore find no deprivation of due process in the proceeding which formalized appellant's decision to extinguish her parental rights in the infant Stephanie Watson...

1. What was the observers' evaluation of the simulation?
2. What decision did the "judges" render and why? Was it different from the actual decision of the Pennsylvania Supreme Court?
3. Do you agree with the actual decision? Why?
4. What factors made this a difficult case to decide?

## ABORTION

For the time being the status of abortion law in the United States remains delineated by two Supreme Court decisions, Roe v. Wade and Doe v. Bolton, both handed down in 1973.

> "In Roe v. Wade, the Court set the basic structure for future state laws. States may not prohibit abortions during the first trimester of pregnancy. From then until viability (the twenty-fourth to twenty-eighth week of pregnancy), the state can establish medical regulations designed to make abortions safe, but it cannot prohibit them. After viability, the state can prohibit abortions except where they are necessary to protect the life or health of the woman.
>
> "The rationale for this timetable turns on the competing interests of the woman and the state. The woman has a right to privacy; the state has an interest in protecting the health of the woman and the potentiality of human life. However, until the end of the first trimester, the mortality rate for childbirth is higher than for abortion; thus the state's interest in preserving a woman's health is not served by outlawing abortions during this time. Viability means that the fetus is potentially able to survive outside the mother's womb; thus, after that point the state's interest in the potentiality of human life takes precedence over the mother's right to privacy and abortions can be prohibited except to preserve her life or health. Even though abortions may thus be proscribed after viability, this limit will probably not be very effective because the Court's 1971 Vuitch decision (United States v. Vuitch, 401 U.S. 62 (1971)) interprets "life or health" so broadly.
>
> "In the second decision, Doe v. Bolton, the Court struck down several procedural regulations in Georgia's....statute. States may not require that abortions be performed in a specially accredited hospital (in Georgia's case by the Joint Commission on Accreditation); and during the first trimester the state cannot even require that abortions be performed in hospitals. After the first trimester, the state can set standards for licensing abortion facilities, but the Court left open the question of whether hospitals can be required during this time period. Approval of abortions by a hospital abortion committee and concurrence with

> the patient's doctor by two other doctors that the abortion is necessary are both invalid regulations throughout the pregnancy. Finally, the state cannot require that the patient be a state resident..."[4]

We say that these abortion cases represent the law of the land with respect to abortion "for the time being" because there is a significant and vocal movement afoot to invalidate the Supreme Court's rulings by passage of a constitutional amendment. Abortion, therefore, is an issue which is far from closed, and it is not improbable that informed persons may have the opportunity to press for or to work against the ratification of such an amendment. The activities which follow, therefore, are designed to enable the student to study the abortion problem in depth so that he/she may decide on the desirability of current abortion law.

---

4 Susan Deller Ross, The Rights of Women - The Basic ACLU Guide to A Woman's Rights, Avon Books, 1973, pp. 194-195.

## I - CASE STUDY: ROE v. WADE

To obtain first-hand an idea of the line of thought taken by the Supreme Court, students are asked to read and brief Roe v. Wade, excerpted below. Each student's brief should contain

(1) a summary of the facts of the case;

(2) an indication of what the issue was, the legal question to be decided;

(3) a statement of the decision reached by the Court; and finally

(4) a short statement of the Court's reasoning: the basis on which it reached its decision.

Students briefs and the questions following the case should generate classroom discussion of the issues -- both narrow and broad -- raised by this case.

ROE v. WADE

Supreme Court of the United States, 1973
410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147

Mr. Justice BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, Doe v. Bolton, post, p. 179, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, or advancing medical knowledge and techniques, and of new thinking about an old issue.

* * * * * * * * * * * * * *

I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code. These make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.

(At this point in its Opinion the Court described the plaintiffs. Plaintiff Jane Roe was an unmarried pregnant woman who wanted a safe, physician-performed abortion in Texas. Plaintiff James Hallford was a physician under prosecution for performing abortions. Plaintiffs John and Mary Doe were a married couple without children who had been advised by their physician that Mrs. Doe should not have children until her "neural-chemical disorder" had improved, although a pregnancy would not have presented a serious risk to her life.)

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); id. at 460 (WHITE, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, Griswold v. Connecticut, 381 U.S., at 486 (GOLDBERG, J. concurring).

(The Court's opinion here includes a long historical account of attitudes toward abortion and of the development of the common law and statutory law on the subject.)

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. The appellants and *amici* contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted the procedure was a hazardous one for the woman. This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest - some phrase it in terms of duty - in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life. Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose. The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus. Proponents of this view point out that in many States, including Texas, by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another. They claim that adoption of the "quickening" distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250,251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices, have, indeed, found at least the roots of that right in the First Amendment, * * * in the Fourth and Fifth Amendments, * * *; in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485; in the Ninth Amendment, id., at 486 (GOLDBERG, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, * * * These decisions make it clear that only

personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453-454; id., at 460, 463-465 (WHITE, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, supra.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, is (sic) unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. * * *

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

(At this point the Court cited the decisions of state and lower federal courts holding the various abortion statutes constitutional or unconstitutional.)

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and pre-natal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969), Sherbert v. Verner, 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. * * * see Eisenstadt v. Baird, 405 U.S., at 460, 463-464 (WHITE, J., concurring in result).

IX

* * *

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amend-ment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The work also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;[2]

---

2 We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. ., in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in § s 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.[3]

All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn. This is in accord with the results reached in those few cases where the issue has been squarely presented. * * * Indeed, our decision in United States v. Vuitch, 402 U.S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

---

3 When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command? There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, supra, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-478, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt*, *Griswold*, *Stanley*, *Loving*, *Skinner*, *Pierce*, and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

(The Court here summarizes the view of various philosophical and religious groups on the question of when life begins, concluding with the modern Roman Catholic position that life begins at the moment of conception.)

Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.[4]

---

4 See Brodie, The New Biology and the Prenatal Child, 9 J. Family L. 391, 397 (1970); Gorney, The New Biology and the Future of Man, 15 U.C.L.A.L. Rev. 273 (1968); Note, Criminal Law - Abortion - The "Morning-After Pill" and Other Pre-Implantation Birth-Control Methods and the Law, 46 Ore. L.Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138-139 (1969); Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich.L.Rev. 127 (1968); Note, Artificial Insemination and the Law, 1968 U.Ill.L.F. 203.

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatmen there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, * * * that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See United States v. Vuitch, 402 U.S., at 67-72.

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *lifesaving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary,

in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the preceding numbered paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

In Doe v. Bolton, post, p. 179, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.[5]

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. * * *

---

5 Neither in this opinion nor in Doe v. Bolton, post, p. 179, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, N.C.Gen.Stat. § 14-45.1 (Supp.1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N.C.A.G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional. *

*Note: For information on how the Supreme Court later dealt with the issue of husband's and parents' rights in abortion cases, see the article "High Court Bars Husband's Power to Veto Abortion" (1976), included at the end of this section of Chapter IV.

## Questions for Discussion of *Roe v. Wade*

1. Justice Blackmun's opinion advances three reasons why criminal abortion laws were enacted in the 19th century and maintained down to the present day: to discourage illicit sexual conduct, to preserve the life and health of women in a day when abortion procedures were exceedingly dangerous, and to protect the life of the unborn. Which of these seems most compelling to you? Why? Which seems most likely? Why?

2. One of the reasons for studying family law is to understand the effect which the law has on the intimate aspects of a citizen's personal life. Yet this curriculum has examined several instances where the court finding the lack of a compelling reason for the state to do so has refused to apply the sanction of law to private behavior, returning the decision, instead, to the citizen him/herself. It has been said that this expansion of a citizen's right of privacy is in accord with the emphasis placed by the Founding Fathers on individual liberty and freedom from meddlesome government. Do you agree? Why?

3. Do you think society as a whole is well-served when citizens are expected to take responsibility for as many decisions regarding personal behavior as possible? Or do you think that society -- through its government -- has the obligation to forbid certain types of behavior in order to promote the type of living it thinks best?

4. Do you think this decision was a good one? Why?

5. Do you think the Supreme Court has any business deciding a question which touches on the mystery of when life begins before that question has been resolved?

6. With what statements in the opinion do you most strongly agree? Why?

7. With what statements do you most strongly disagree? Why?

8. What effect, if any, do you think the Women's Liberation Movement has had on the Supreme Court as reflected in this decision?

## II - READING/RESEARCH *

The topic of abortion has many facets: not only legal, but also psychological, sociological, theological, medical, and physical. Reams have been written on each of these aspects, and students may want to research some of them. Different students might be assigned to look further into each of the areas below and/or others not mentioned. Each class member could then share his findings in an oral report or presentation.

- What are some of the moral arguments for and against abortion? On what reasoning are they based? Evaluate them.
- What do abortion procedures entail? How safe are they? What are the physical aftereffects of an abortion?
- What can the psychological aftereffects of abortion be? How can they be treated?
- What effect has liberalized abortion law had on family planning? Is it a good method of birth control? Why?
- Is there any evidence that population control, of which abortion is one form, is a type of genocide against blacks and other minorities?

Books and magazine articles will provide some information on these topics. A good reference book to begin with is The Abortion Controversy (2nd Edition) by Betty Sarvis and Hyman Rodman (Columbia University Press, New York, 1974) which treats all of them and has an excellent bibliography.

* The organizations listed in the Appendix, many of which are directly concerned on one side or the other of the abortion issue, would serve as good sources of ideas and information for any of the activities included on this and the following two pages.

## III - ROUNDTABLE OR DEBATE *

Students may wish to invite to class professionals whose work causes them to confront the abortion problem: doctors, nurses, lawyers, social workers, clergymen, psychologists. Several of these persons might be asked to hold a roundtable discussion where points of view from each professional's perspective could be aired.

Alternatively, students might prepare a pro-/con- abortion debate or invite speakers to do so.

## IV - LEGISLATIVE DRAFTING *

Although the United States Supreme Court has ruled on abortion in a way that renders every state's statutes (except New York's) on the subject either completely or partially unconstitutional, few states have revised their laws to conform with the Court's decisions.[5] Abortion tends to be an issue too hot for most politicians who wish to remain in public life to handle. If, therefore, a woman lives in a state which has restrictive abortion laws she has no choices but to travel to another state or to challenge her state's laws in court. Both of these solutions are expensive and time-consuming.

As a possible long-range solution to your state's abortion law quandary, draft - with the help of an attorney, state legislator, or legislative aide - a new abortion law for your state which complies with the Supreme Court's decisions on the subject. To begin, one or more students might go to the law library, find the existing law, and try to see where it is out of step with Supreme Court guidelines.

---

5 On this subject see Shana Alexander's Essay, "When I Want An Abortion," in her State-by-State Guide to Women's Legal Rights, Wollstonecraft, Inc., 1971, pp. 84-85.

## V CONSTITUTIONAL AMENDMENT *

Debate either or both these proposed amendments to the U.S. Constitution:

1. "Neither the United States, nor any state, shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protection of the laws."

2. "Nothing in this Constitution shall bar any state or territory or the District of Columbia, with regard to any area over which it has jurisdiction, from allowing, regulating, or prohibiting the practice of abortion."

What is the difference between these two proposed amendments?

Background from The New York Times, July 2, 1976

# HIGH COURT BARS HUSBAND'S POWER TO VETO ABORTION

Copyright article was removed by ERIC.

# STERILIZATION

## Voluntary Sterilization

Over the years there has been some doubt whether voluntary sterilization (vasectomy for men, salpingectomy for women) may be lawfully performed upon a consenting adult for non-therapeutic reasons, that is, as a birth control measure. The operation for men is simple, may be performed under local anaesthetic, and quite safe. For women the operation requires an abdominal incision and involves somewhat greater risk. Neither operation affects sexual drives or sexual satisfaction. Sterilization is the most effective method of contraception but it is not infallible, since in a very small proportion of cases the sperm or ovum-carrying tubes which are interrupted by the operation may recanalize themselves. Perhaps the most serious objection to sterilization as a method of birth control is that it is irreversible. In the past the doubts about the legality of the operation have sometimes dissuaded physicians from performing it. Today, however, the doubts appear to have been largely dispelled. A few states have statutes expressly authorizing non-therapeutic sterilization with certain safeguards as to consent. The statutes require not only the consent of the person being sterilized, but also that of his spouse if he is married and not separated from his spouse.

The court has held that voluntary, non-therapeutic sterilization is legal, suggesting that a contrary rule might violate the principle of Griswold v. Connecticut and suggesting that the right to sterilization is protected by the constitutional right to privacy. Since sterilization is not in all cases 100% effective, the legal problem in voluntary sterilization is the question of physicians' liability for pregnancies occurring after the operation. The question is not settled, but there have been cases in which patients have been awarded compensation for such pregnancies.

## Involuntary Sterilization

The two most famous United States cases on compulsory or involuntary sterilization were decided by the Supreme Court in 1927 and 1942. Buck v. Bell is reprinted below in its entirety to allow students the opportunity to evaluate the reasoning and social priorities of the Court speaking through Mr. Justice Holmes. Then the facts of a case which came before the Supreme Court fifteen years later, Skinner v. Oklahoma, are given and each student is asked to render a decision. Consideration of these two cases should permit students to observe and evaluate the progress of the law in this area.

BUCK V. BELL, 274 U.S. 200 (1927)

Mr. Justice Holmes delivered the opinion of the Court.

This is a writ of error to review a judgment of the Supreme Court of Appeals of the State of Virginia, affirming a judgment of the Circuit Court of Amherst County, by which the defendant in error, the superintendent of the State Colony for Epileptics and Feeble Minded, was ordered to perform the operation of salpingectomy upon Carrie Buck, the plaintiff in error, for the purpose of making her sterile. 143 Va.310, 130 S.E. 516. The case comes here upon the contention that the statute authorizing the judgment is void under the Fourteenth Amendment as denying to the plaintiff in error due process of law and the equal protection of the laws.

Carrie Buck is a feeble-minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child. She was eighteen years old at the time of the trial of her case in the Circuit Court in the latter part of 1924. An Act of Virginia approved March 20, 1924 (Laws 1924, C.394) recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, etc.; that the sterilization may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc. The statute then enacts that whenever the superintendent of certain institutions including the above-named State Colony shall be of opinion that it is for the best interest of the patients and of society that an inmate under his care should be sexually sterilized, he may have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, etc., on complying with the very careful provisions by which the act protects the patients from possible abuse.

The superintendent first presents a petition to the special board of directors of his hospital or colony, stating the facts and the grounds for his opinion, verified by affidavit. Notice of the petition and of the time and place of the hearing in the institution is to be served upon the inmate, and also upon his guardian, and if there is no guardian, the superintendent is to apply to the Circuit Court of the County to appoint one. If the inmate is a minor notice also is to be given to his parents, if any, with a copy of the petition. The board is to see to it that the inmate may attend the hearings if desired by him or his guardian. The evidence is all to be reduced to writing, and after the board has made its order for or against the operation, the superintendent, or the inmate, or his guardian,

may appeal to the Circuit Court of the County. The Circuit Court may consider the record of the board and the evidence before it and such other admissible evidence as may be offered, and may affirm, revise, or reverse the order of the board and enter such order as it deems just. Finally any party may apply to the Supreme Court of Appeals, which, if it grants the appeal, is to hear the case upon the record of the trial in the Circuit Court and may enter such order as it thinks the Circuit Court should have entered. There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process at law.

The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. The judgment affirms the facts that have been recited and that Carrie Buck "is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization," and therefore makes the order. In view of the general declarations of the Legislature and the specific findings of the Court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for those lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. Three generations of imbeciles are enough.

But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.

Judgment affirmed.

Mr. Justice Butler dissents.

Questions for Discussion

1. What was the Supreme Court asked to decide in Buck v. Bell?

2. What decision did it reach?

3. Do you agree with the decision?

4. Do you agree with the reasoning of Mr. Justice Holmes that the State has the right to ask mentally handicapped persons to forfeit their right to have children "to prevent our being swamped with incompetence"? Why?

5. Does the fact that this opinion was written in 1927 have any effect on your evaluation of it?

6. Mr. Justice Holmes writes: "...there can be no doubt that... the plaintiff in error has had due process of law." Do you agree?

# SKINNER V. OKLAHOMA

Now read the facts in the case of Skinner v. Oklahoma, keeping in mind as you do so that Skinner is a criminal rather than an insane person and that this case was decided in 1942, almost two decades after Buck v. Bell.

The statute involved is Oklahoma's Habitual Criminal Sterilization Act. That Act defines an "habitual criminal" as a person who, having been convicted two or more times for crimes "amounting to felonies involving moral turpitude" either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution. Machinery is provided for the institution by the Attorney General of a proceeding against such a person in the Oklahoma courts for a judgment that such person shall be rendered sexually sterile. Notice, an opportunity to be heard, and the right to a jury trial are provided. The issues triable in such a proceeding are narrow and confined.

If the court or jury finds that the defendant is an "habitual criminal" and that he "may be rendered sexually sterile without detriment to his or her general health", then the court "shall render judgment to the effect that said defendant be rendered sexually sterile", by the operation of vasectomy in case of a male and of salpingectomy in case of a female.

Petitioner Skinner was convicted in 1926 of the crime of stealing chickens and was sentenced to the Oklahoma State Reformatory. In 1929 he was convicted of the crime of robbery with fire arms and was sentenced to the reformatory. In 1934 he was convicted again of robbery with firearms and was sentenced to the penitentiary. He was confined there in 1935 when the Act was passed. In 1936 the Attorney General instituted proceedings against him. Petitioner in his answer challenged the Act as unconstitutional by reason of the Fourteenth Amendment. A jury trial was had. The court instructed the jury that the crimes of which petitioner had been convicted were felonies involving moral turpitude and that the only question for the jury was whether the operation of vasectomy could be performed on petitioner without detriment to his general health. The jury found that it could be. A judgment directing that the operation of vasectomy be performed on petitioner was affirmed by the Supreme Court of Oklahoma by a five to four decision.

Questions

1. What decision do you think the Supreme Court reached on the question of whether the compulsory sterilization of Skinner would violate his right to equal protection of the law under the 14th Amendment to the Constitution? Why?

2. What decision would you reach?

SKINNER V. OKLAHOMA, 316 U.S. 535 (1942)

Excerpts from the decision, written by Justice Douglas:

But the instant legislation runs afoul of the equal protection clause, ... We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of "equal protection of the laws is a pledge of the protection of equal laws..." When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment... Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. Oklahoma's line between larceny by fraud and embezzlement is determined, as we have noted, "with reference to the time when the fraudulent intent to convert the property to the taker's own use" arises... We have not the slightest basis for inferring that that line has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses. In terms of fines and imprisonment the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn... In Buck v. Bell, supra, the Virginia statute was upheld though it applied only to feeble-minded persons in institutions of the State. But it was pointed out that "so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached." 274 U.S. page 208... Here there is no such saving feature. Embezzlers are forever free. Those who steal or take in other ways are not. If such a classification were permitted, the technical common law concept of a "trespass" based

on distinctions which are "very largely dependent upon history for explanation" could readily become a rule of human genetics.

Questions for Discussion

1. Why do you think the Supreme Court upheld compulsory sterilization in Buck v. Bell but struck it down in Skinner?

2. Do you think the Court overruled its own decision in Buck v. Bell?

3. Do you think the result in Skinner would have been different if the sterilization law had been applicable to all who steal? Why?

4. How do you think the Court might rule if a compulsory sterilization case came before it today? Why? What further information might help you answer this question?

5. Under what circumstances, if any, do you think the State has the right to force sterilization of its citizens?

# HYPOTHETICAL CASE ON COMPULSORY STERILIZATION

June Doe, a girl of seventeen, ran away from home at the age of fourteen and had been living with three other girls and four boys in a slum apartment in a large city. They were supported in a meager way by pooling the part-time earnings of the boys. At the age of fifteen June had a child but did not know who the father was. The child was removed from her custody by the juvenile court when it was eighteen months old on a finding that the baby was dependent and neglected. June's parental rights with respect to this baby were terminated and the baby successfully placed for adoption.

Just recently June has had another baby, and since she had been having sexual relations only with Tom, one of the boys in the group, over the preceeding year, she was sure he was the father. Tom is also seventeen years old, and admits with some pride to being the father of at least three other children, although he does not know where these children or their mothers are. The local visiting nurse was given June's name when June was discharged from the hospital after the birth and called upon June two weeks later. The nurse found the baby malnourished and suffering from a skin disease caused by infrequent bathing and lack of care. The nurse notified the juvenile court, and after an investigation of the situation by its staff a petition was filed alleging that the baby was dependent and neglected. Another petition was filed alleging that Tom was delinquent in that he had violated the state statute making fornication a crime and had failed to support the child whose father he was, also a crime.

The juvenile court heard both petitions at once, found the baby neglected and placed it in a foster home. The court then ordered June to report to the local clinic of Planned Parenthood to be fitted with an intrauterine contraceptive device (IUD) by the Planned Parenthood physician. The order stated that the IUD was to be retained by June, provided no medical reasons for its removal appeared, until she should reach age twenty-one. The court found Tom to be a delinquent, under the statute which defined a delinquent child to be "any child under the age of eighteen who has violated any state or federal law". The court then sentenced Tom to one year in the state training school, but suspended the sentence on condition that Tom also attend the Planned Parenthood clinic and arrange to be sterilized by the clinic physician.

1. If you were appointed to represent June and Tom on an appeal from the juvenile court's decision, what arguments would you make and how would you expect the appellate court to rule?

2. Assume that the juvenile court had jurisdiction of the case and that the petition and hearing complied with the stautory procedure. The juvenile code authorizes the court in the case of neglect to require the parent to refrain from acts tending to make the home an improper place for the child, or to terminate parental rights. The code also

authorizes the court, in cases of delinquency, to impose fines, or to sentence the child to the state training school for a period ending at the child's age twenty-one, or to assign the child to a state supervised work program. Would this case be affected by the fact that the parents of Tom and June gave their consent to the sterilization and the insertion of an IUD, even though Tom and June did not consent?

# APPENDIX

## RESOURCES RELATED TO FAMILY LAW ISSUES

The following list of national and state organizations and groups is included to provide the teacher and student with the widest variety of resources possible on family law issues. Many of the organizations have a particular point of view to advocate on controversial subjects such as abortion, but they should prove valuable as sources of information and arguments for classroom discussion and debate as well as for independent student research projects.

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
900 Lake Shore Drive
Chicago, Illinois 60611

AMERICAN CIVIL LIBERTIES UNION (ACLU)
156 Fifth Avenue
New York, New York 10010

ACLU WOMEN'S RIGHTS PROJECT
22 East 40th Street
New York, New York 10016
(212) 725-1222

AMERICAN INSTITUTE OF FAMILY RELATIONS
5287 Sunset Boulevard
Los Angeles, California 90027

ASSOCIATION FOR THE STUDY OF ABORTION, INC.
120 West 57th Street
New York, New York 10019

ASSOCIATION FOR VOLUNTARY STERILIZATION
708 Third Avenue
New York, New York 10017
(212) 986-3880

BISHOPS' COMMITTEE FOR PRO-LIFE ACTIVITIES
National Conference of Catholic Bishops
1312 Massachusetts Avenue, N.W.
Washington, D.C. 20005

CENTER FOR CONSTITUTIONAL RIGHTS
588 Ninth Avenue
New York, New York 10036

CENTER FOR FAMILY PLANNING PROGRAM DEVELOPMENT
Planned Parenthood--World Population
1666 K Street, N.W.
Washington, D.C. 20006

COMMISSION ON MARRIAGE AND FAMILY LIFE
475 Riverside Drive, Room 711
New York, New York 10027

FAMILY PLANNING PUBLIC AFFAIRS OFFICE
32 West Lafayette Street
Trenton, New Jersey 08608
(609) 393-7474

HOMOSEXUAL INFORMATION CENTER
3473½ Cahuenga Boulevard
Los Angeles, California 90068

MATTACHINE SOCIETY, INC.
348 Ellis Street
San Francisco, California 94102

NATIONAL ABORTION RIGHTS ACTION LEAGUE
250 West 57th Street
New York, New York 10019

NATIONAL COMMITTEE FOR A HUMAN LIFE AMENDMENT, INC.
1707 L Street, N.W., Suite 400
Washington, D.C. 20036

NATIONAL COUNCIL ON FAMILY RELATIONS
1219 University Ave., S.E.
Minneapolis, Minnesota 55414

NATIONAL ORGANIZATION OF WOMEN (NOW)
NOW National Office
5 South Wabash, Suite 1615
Chicago, Illinois 60603

NOW PUBLIC INFORMATION OFFICE
527 Madison Avenue
New York, New York 10022

NATIONAL RIGHT TO LIFE COMMITTEE, INC.
National Press Building, Suite 557
529 14th Street, N.W.
Washington, D.C. 20045

NEW JERSEY ACLU
45 Academy Street
Newark, New Jersey 07102
(201) 642-2084

NEW JERSEY RIGHT TO CHOOSE
P.O. Box 343
East Brunswick, New Jersey 08816

NEW JERSEY RIGHT-TO-LIFE
Box 705
Dover, New Jersey 07801

NEW JERSEY STATE BAR ASSOCIATION
172 West State Street
Trenton, New Jersey 08608
(609) 394-1101
(You may wish to specifically address requests to Family Law Section or Women's Rights Section)

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.
810 Seventh Avenue
New York, New York 10019
(also check for local/regional offices of Planned Parenthood)

RELIGIOUS COALITION FOR ABORTION RIGHTS
100 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 543-7032

SEX INFORMATION AND EDUCATION COUNCIL OF THE U.S. (SIECUS)
1855 Broadway
New York, New York 10023

STUDENT HOMOPHILE LEAGUE
202 Earl Hall
Columbia University
New York, New York 10027

SELECTED BIBLIOGRAPHY


Alexander, Shana, State-by-State Guide to Women's Legal Rights, Los Angeles, Wollstonecraft, 1975.

The American Family, Newsweek News Focus, January 1975, Volume 9, No. 2., New York, Newsweek Educational Division, 1975.

Clark, Homer H., Jr., Cases and Problems on Domestic Relations, St. Paul, West Publishing, 1974.

Clark, Homer H., Jr., The Law of Domestic Relations, St. Paul, West Publishing, 1968.

Deming, Richard, Man Against Man: Civil Law at Work, New York, Dell Publishing, 1972.

Foote, Caleb, et. al., Cases and Materials on Family Law, Boston, Little, Brown.

Gerlach, Ronald A. and Lamprecht, Lynne W., Teaching About the Law, Cincinnati, W. H. Anderson, 1975.

Longaker, Richard P. and Quigley, Charles N., High School Law Program--Attorney's Source Book, Chicago, Young Lawyers Section, American Bar Association, 1973.

McCuen, Gary E. and David L. Bender, The Sexual Revolution (Traditional Mores Versus New Values), Opposing Viewpoints Series, Vol. 7, Anoka, Minn., Greenhaven Press, 1972.

Newman, Jason and O'Brien, Edward, Street Law (A project of the Georgetown University Law Center), St. Paul, West Publishing, 1975.

Paulsen, Monrad G. and Wadlington, Walter, Domestic Relations: Statutory Materials, Mineola, New York, Foundation Press, 1970.

Ross, Susan Deller, The Rights of Women (An American Civil Liberties Union Handbook), New York, Avon Books, 1973.

Ryan, Philip A. and Granfield, Dom David, Domestic Relations: Civil and Canon Law, Mineola, New York, Foundation Press, 1963.

Sarvis, Betty and Rodman, Hyman, The Abortion Controversy, New York, Columbia University Press, 1974.

Walbert, David F. and Butler, J. Douglas, Abortion, Society and the Law, Cleveland, The Press of Case Western Reserve University, 1973.

## HOW TO FIND LEGAL CASES

Any case which has been adjudicated in a court of law is given a title, reference letters, and numbers. The "citation," as it is called, which follows the title of the case (plaintiff v. defendant), indicates what court decided the case and when and where the decision is printed. Therefore, if a teacher or student wishes to consult the text of a decision on a case cited in this manual or elsewhere, he or she should be able to find it in a law library. There are law libraries at all college and university law schools and in the Federal Court Buildings and State House. If still at a loss, there will usually be someone there willing to help a "bewildered layman."

Use the following examples as a guide:

1. Griswold v. Connecticut, 381 U.S. 479 (1965). The letters "U.S." indicate that this case was decided by the United States Supreme Court, the highest court in the Country, and can be found in the United States Reports. From the numbers, it becomes clear that the case is located in Volume 381 of the U.S. Reports at page 479 and that it was decided in 1965.

2. Richards v. Thurston, 424 F. 2d 1281 (1st Cir. 1970). This case is found in volume 424 of the Federal Reporter, Second Series at page 1281. Cases found in the Federal Reporter ("Fed.") or Federal Reporter, 2nd Series ("F.,2d") were decided by the United States Courts of Appeals, of which there are eleven - one level below the Supreme Court. In this one, the notation within the parenthesis indicates the case was decided by the Court of Appeals for the First Circuit in 1970.

3. Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967). The Federal Supplement ("F.Supp.") reports, for the most part, cases from the United States District Courts, of which there are one or more in each state. This case, found in volume 272 of the Federal Supplement at page 947, was decided by the U.S. District Court for the District of South Carolina in 1967.

4. Painter v. Bannister, 258 Iowa 1390, 140 N.W. 2d 152 (1966). This case was decided by the Supreme Court of the State of Iowa in 1966. It can be found in volume 258 of the Iowa Reports, beginning on page 1390; alternatively, one can locate it in volume 140 of the NorthWest Reporter, 2nd Series (published by West Company) at page 152.

SELECTED RELEVANT AMENDMENTS TO THE U.S. CONSTITUTION

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 3

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 19

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment 27

(Proposed Equal Rights Amendment, passed by Congress, ratification by 38 states pending.)

Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.